L. H. Hedrick
Wm. H. Lawrence

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 316

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

YNCHAUSTI AND COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

94

PETITION FOR CERTIORARI FILED MARCH 16, 1926

CERTIORARI GRANTED APRIL 26, 1926

(31,774)

(31,774)

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THE UNITED STATES OF AMERICA

PHILIPPINE ISLANDS

IN THE SUPREME COURT OF THE PHILIPPINE ISLANDS

G. R. No. 23601—CONCERNING PETITION FOR MANDAMUS

YNCHAUSTI & COMPANY
Petitioner

VERSUS

BEN F. WRIGHT
As Auditor for the Philippine Islands
Respondent

(ORIGINAL JURISDICTION)

BE IT REMEMBERED that, on the dates respectively mentioned, the following proceedings were had in the above-entitled case:

On January 19, 1925, the petitioner, by its attorneys filed with the Office of the Clerk of the Supreme Court, the following petition for mandamus:

(CAPTION AND TITLE OMITTED)

PETITION

To the Honorable Supreme Court
of the Philippine Islands:

Comes now Ynchausti & Company, Petitioner, by its undersigned attorneys, and respectfully shows unto this Honorable Court:

I

That Petitioner is and was, during all the times hereinafter mentioned, a regular collective commercial partnership, duly organized, registered and existing under the laws of the Philippine Islands, and having its principal office and place of business in the City of Manila in said Islands.

II

That Respondent is the duly appointed, qualified and acting Auditor for the Philippine Islands.

III

That V. Aldanese is the duly appointed, qualified and acting Insular Collector of Customs and the duly appointed, qualified and acting Collector of Customs of the Port of Manila, Philippine Islands.

IV

That your Petitioner, during all the times hereinafter mentioned has been and is agent and operator of the S. S. "VENUS," a steam vessel engaged in the coastwise trade of the Philippine Islands.

V

That between February 12th, 1924, and September 16th, 1924, your Petitioner, because no adequate facili-

ties exist therefor in the Philippine Islands, caused certain heavy repairs and reconstruction work to be done in Hongkong on said S. S. "VENUS," the cost of which was $300,004.90, Hongkong Currency.

VI

That upon the arrival of said S. S. "VENUS" in Philippine waters, and on or about the 20th of October, 1924, the said V. Aldanese, in his official capacity as Insular Collector of Customs and Collector of the Port at Manila, by assessment (Entry) No. 316654-A, assessed the customs duty payable on said repairs and reconstruction work at P159,960.00, and made demand upon your Petitioner for the payment of said sum.

VII

That on October 24th, 1924, your Petitioner paid to said V. Aldanese, in his said capacity as Insular Collector of Customs and Collector of Port for the City of Manila, the said sum of P159,960.00 so demanded by him, under protest, No. 14061, dated the same day, said protest being on the ground that said repairs and reconstruction work were exempt from the payment of customs duty under Paragragh 200, Section 8, and Paragraph 348, Section 11 of the Philippine Tariff Act of 1909. A copy of said protest is hereunto annexed, and hereby made a part hereof, marked Exhibit "A."

VIII

That thereafter on October 31st, 1924, and after a hearing, the said V. Aldanese, in his official capacity as Insular Collector of Customs, rendered a decision sustaining your Petitioner's said protest No. 14061, and ordering a refund to your Petitioner of the said customs duty theretofore collected from and paid by it under protest, amounting to P159,960.00, Philippine Currency, as

hereinabove alleged. A copy of said decision is hereunto annexed and hereby made a part hereof, marked Exhibit "B."

IX

That copies of the aforesaid decision, Exhibit "B," of the said Insular Collector of Customs, on the aforesaid protest No. 14061 of your Petitioner, were immediately transmitted by him to the Secretary of Finance of the Philippine Islands and to the respondent Auditor for the Philippine Islands, and the Secretary of Finance failed, within fifteen days, or at any other time, to certify that in his opinion the said decision ought to be revised by the Court of First Instance of the City of Manila, or to order its removal thereto, wherefore said decision has become final and conclusive upon the Government of the Philippine Islands, as provided in Section 1383 of the Administrative Code.

X

That on November 6th, 1924, the respondent, without any authority in law therefor, addressed a letter to the said Insular Collector of Customs, asking the latter to reconsider his said decision, Exhibit "B," and the said Insular Collector of Customs, after due consideration, denied said application for reconsideration, and affirmed his said decision of October 31st, 1924, Exhibit "B."

XI

That on the 26th day of November, 1924, the said V. Aldanese, in his said capacity as Insular Collector of Customs, executed his warrant No. 210175 in favor of your Petitioner for the sum of P159,960.00 said warrant being for the refund of said import duty, entry No. 31654-A, Protest No. 14061, theretofore assessed and collected, as hereinabove alleged, and presented it to the

respondent herein for counter-signature, as provided in Section 621 of the Administrative Code, and the said respondent herein, nothwistanding the request of said V. Aldanese, as Insular Collector of Customs, for said counter-signature, thereupon wrongfully and unlawfully refused and declined and still wrongfully and unlawfully refuses and declines to countersign the same, and in so doing, has prevented and still prevents your Petitioner from obtaining reimbursement for the customs duties wrongfully and erroneously assessed and collected from it, as hereinabove alleged.

XII

That your Petitioner has no other or further recourse in the premises than that herein prayed for, nor any plain, speedy and adequate remedy in the ordinary course of the law, and has sustained and is sustaining great loss and irreparable damage and injury by reason of the wrongful and unlawful action of respondent in declining and refusing to countersign said Warrant No. 210175, all as aforesaid.

WHEREFORE, Petitioner prays that a Peremptory Writ of Mandamus directed to respondent Insular Auditor be issued out of this Honorable Court requiring the respondent forthwith to countersign said Warrant No. 210175; and for such other and further relief as may be proper in the premises, and for costs.

Manila, P. I., January 19, 1925.

FISHER, DEWITT, PERKINS & BRADY,
By
(Sgd.) C. A. DEWITT,
Attorneys for Petitioner,
601 Pacific Building, Manila.

CITY OF MANILA,
PHILIPPINE ISLANDS. } *ss:*

F. V. KAUFFMANN, being first duly sworn, deposes and says: That he is one of the Managing-Partners of

Ynchausti & Company, the Petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that all the facts set out therein are true to the best of his knowledge and belief.

(Sgd.) F. V. KAUFFMANN.

Subscribed and sworn to before me on this 19th day of January, 1925. Affiant exhibited his cedula No. F-3564, issued at Manila, P. I., on January 3rd, 1925.

(Sgd.) TOMAS CONTRERAS,
Notary Public.

My commission expires December 31, 1926.
Doc. No. 31.
Page No. 33.
Book No. 11.
Series of 1925.

EXHIBIT "A"

October 24th, 1924.

The Insular Collector of Customs,
Manila.

Dear Sir:

Please be advised that the sum of One Hundred fifty-nine thousands and nine hundred sixty (P159,-960.00) Pesos paid you today as customs duty under assessment (Entry) No. 31654-A, because of the reconstruction made on the S. S. "VENUS" in Hongkong, pursuant to the provisions of the Philippine Tariff Act of 1909, is paid under protest. This protest is made upon the ground that said reconstruction is exempt from duty by virtue of the provisions of paragraph 200, section 8, and paragraph 348, section 11 of the Philippine Tariff Act of 1909, and the decisions of the Supreme Court in the cases, Fernandez Hermanos vs. Collector of Customs (1915, 30 Phil. 50) and Gutierrez Hnos. vs. Collector of Customs (1919, 39 Phil. 876).

There are enclosed herewith copies of the certificates of Earnshaws Docks & Honolulu Iron Works, Varadero

de Manila and of Messrs. C. B. Nelson and Carlos E. Pombo, which establish the fact that there are no adequate facilities afforded in the Philippine docks to build the main boiler, H. P. cylinder and thrust shafts; and to carry out the reconstruction made on the S. S. "Venus" at Hongkong, hence the same should be exempt from import duty.

Very respectfully,

P2.00 Stamp.

1. The number of the entry covering the reconstruction was declared.. 31654-A
2. The register number assigned the vessel on its arrival after reconstruction 652
3. The number of the voucher upon which payment was made..... 39138
4. The date of payment of the customs duty ..... October 24, 1924

EXHIBIT "B"

Protest No. 14061.

In the matter of Protest Numbered 14061, filed October 24, 1924, by Ynchausti & Co., Manila, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty on cost of repairs the S. S. "Venus," Entry No. 31654-A, Voucher No. 39138, paid October 24, 1924.

DECISION

This protest is against the assessment of duty on cost of repairs made at Hongkong to the steamship "Venus" of Ynchausti & Co., Manila, under paragraph 200 of the Philippine Tariff Act of 1909 at fifty per centum ad valorum instead of exempting the same from duty by virtue of the provisions of paragraph 200 and 348 of the said Tariff Act.

The only question to be considered in this case is whether the repairs are entitled to free duty or not, or whether adequate facilities exist in the Philippine Islands for carrying out such repairs or not. In order to give the protestants an opportunity to prove their claim, a hearing was held on October 27, 1924, and the following evidence was produced:

A letter of Fernandez Hermanos to Mariano Yenko, Marine Surveyor, acting as Marine Superintendent for Ynchausti & Co., dated March 8, 1924, in which the former state that they cannot construct a boiler for the S. S. "Venus" (Exhibit "A").

A letter of the Earnshaws Docks and Honolulu Iron Works to Mariano Yenko, dated February 18, 1924, stating that they are unable to construct a new, complete boiler, but that they have a powerful derrick to remove the old one and place a new one (Exhibit "B").

A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated September 25, 1924, informing the latter that the maximum lifting capacity of their floating derrick is 25 tons (Exhibit "C").

A letter of Carlos Pombo to Ynchausti & Co., dated October 9, 1924, advising that it is impossible to construct a boiler with cylinder and a thrust shaft for the "Venus" in the Philippines (Exhibit "D").

A letter of the Earnshaws Docks and Honolulu Irons Works to Ynchausti & Co., dated October 10, 1924, certifying that their shops have no adequate facilities to make H. P. cylinder and thrust shaft with thrust blocks for S. S. "Venus." They also correct the statement contained in their letter of February 18, 1924, Exhibit "B," to the effect that they have found out that the "Venus" boiler is too heavy for their derrick (Exhibit "E").

A certificate of the Hongkong & Whampoa Dock Co., Ltd., stating the weights of the component parts of the boiler built by the same for the "Venus" (Exhibit "F").

A letter of C. B. Nelson, Marine Surveyor, to Ynchausti & Co., dated October 15, 1924, stating that no vessel of the size of the S. S. "Venus" has been reconstructed at this port and has "such extensive repairs carried out," and that the main boiler and thrust shaft could not be made at Manila (Exhibit "G").

The statements contained in the above letters and certificates have been confirmed by the parties subscribing the same, at the hearing, and have been corroborated by the Chief of Hull and Boiler Division of this Bureau. The lack of adequate facilities is, therefore, clearly established and the undersigned is convinced that the repairs to and reconstruction of the Steamship "Venus" could not be effected in the Philippine Islands.

This case is identical with that of Fernandez Hermanos vs. the Insular Collector of Customs (R. G. No. 8667, Vol. 30, page 50, of Philippine Reports) and the decision thereon applies hereto.

Protest No. 14061 is, therefore, for the foregoing reasons, sustained and a refund of the customs duty collected is ordered to the protestants.

(Sgd.) V. ALDANESE,
Insular Collector of Customs.

A TRUE COPY.
(Sgd.) F. CORRALES,
Secretary Board of Protests and Appeals.

On January 21, 1925, the following summons was issued:

(CAPTION AND TITLE OMITTED)

WHEREAS this Court on the 20th instant, approved a resolution which is quoted below:

"Considering the petition filed in case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., praying that a peremptory writ of mandamus be issued requiring the respondent Insular Auditor to forthwith countersign warrant No.

210175 referred to therein, it is ordered that the respondent demur or answer said petition within ten days from notice hereof and from the receipt of copy of the petition."

NOW, THEREFORE, You are hereby ordered to demur or answer said petition within ten days from the receipt of this summons with a copy of the petition.

Given by HON. E. FINLEY JOHNSON, Acting Chief Justice of the Supreme Court of the Philippine Islands, this 21st day of January, nineteen hundred and twenty-five.

(Sgd.) V. ALBERT,
Clerk, Supreme Court, P. I.

On January 28, 1925, the respondent filed the following motion:

(CAPTION AND TITLE OMITTED)

Comes now the Respondent Ben F. Wright as Auditor for the Philippine Islands, and respectfully requests this Honorable Court for an extension of ten days within which to demur or answer the above entitled petition, for the following reasons:

1. That on January 23, 1925, the Bureau of Audits received by ordinary mail copy of the summons in the above mentioned petition, addressed to said respondent, but that no copy of said petition had been attached to or served with said summons; and that the said respondent, therefore, has not been aware of, nor knew the contents of said petition except this date, January 28, 1925, when a copy of the same was furnished him by the office of the Attorney-General.

2. That said respondent was in Baguio on leave of absence from office since January 16 up to January 27, 1925.

3. That the time for demurring or answering the said petition expires on February 2, 1925.

4. That in view of all the above, said respondent does not, therefore, have sufficient time to study the case and decide what action to take in the premises.

(Sgd.) BEN F. WRIGHT,
Respondent.

Manila, P. I.
January 28, 1925.

On January 30, 1925, the Petitioner filed the following objection to the preceding motion:

(CAPTION AND TITLE OMITTED)

Comes now Ynchausti & Company, the petitioner herein, and objects to the motion of respondent, dated January 28, 1925, praying for an extension of ten days within which to demur or answer the petition herein, on the following grounds:

That the reasons adduced in support of said motion are neither adequate nor sufficient;

That the granting of said motion and the consequent delay of these proceedings will cause your petitioner irreparable damage, because of the large amount herein involved, and the loss of interest thereon. Such interest cannot be recovered from the Government of the Philippine Islands.

WHEREFORE petitioner respectfully prays that the said motion of the respondent herein be denied.

Manila, P. I., January 29, 1925.

FISHER, DEWITT, PERKINS & BRADY,
By: (Sgd.) C. A. DEWITT,
Attorneys for Petitioner.

Rec'd.
1/30/25 at 10:30 A. M.
BFW.

On January 29, 1925, the Supreme Court issued the following resolution:

"Considering the motion of the respondent filed in case No. 23601, Ynchausti & Company vs. Ben

F. Wright, etc., praying for the reasons given, that an exteision of ten days be granted him within which to demur or answer the complaint filed therein, MOTION GRANTED."

On January 31, 1925, the Supreme Court passed the following resolution:

"Considering the motion of the attorneys for the petitioner in case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., objecting, for the reasons given, to the motion of the respondent asking for an extension of ten days within which to demur or answer the petition therein, OBJECTION OVERRULED."

On February 10, 1925, the respondent filed the following answer to the petition:

(CAPTION AND TITLE OMITTED)

ANSWER

Comes now the undersigned Insular Auditor, respondent in the above entitled action, and answering the petition on file herein alleges:

I

That he admits the allegations contained in paragraphs I, II, III, IV, VI, and VIII of the petition.

II

That he denies all and singular the allegations contained in paragraphs V, VII, IX, X, XI, and XII of the said petition, with the exception of those which, in his defense, may be expressly admitted.

III

That as a special defense, the respondent alleges the following:

1. That the S. S. "Venus" owned and operated by the petitioner is a steam vessel documented for the Philippine coastwise trade, and whose tonnage, gross and net, at the time it was to be repaired, were 987.64 and 597.74, respectively.

2. That prior to February, 1924, said S. S. "Venus" needed certain repairs thereon.

3. That, notwithstanding the existence and availability of adequate facilities therefor in the Philippine Islands, the petitioner, between February, 1924, and September, 1924, caused the said repairs to be done in Hongkong on said S. S. "Venus," the cost of which was $300,004.00, Hongkong currency.

4. That upon the arrival of said S. S. "Venus" in Philippine waters, and on or about the 20th of October, 1924, the Insular Collector of Customs at Manila, by assessment (Entry) No. 316654-A, assessed the customs duty payable on said repairs at P159,960.00, and made demand upon the petitioner for the payment of said sum.

5. That on October 24th, 1924, the petitioner paid to V. Aldanese, in his capacity as Insular Collector of Customs and Collector of Port for the City of Manila, the said sum of P159,960.00, under protest No. 14061, dated the same day.

6. That thereafter on October 31st, 1924, the said V. Aldanese, in his official capacity as Insular Collector of Customs rendered a decision sustaining the said petitioner's protest No. 14061, and ordering a refund to the petitioner of the said custom duty, theretofore collected from and paid by it under protest, amounting to P159,-960.00, Philippine currency.

7. That on the same day, October 31st, 1924, the respondent Insular Auditor received a copy of the aforesaid decision of the Insular Collector of Customs, on the said protest No. 14061 of the petitioner.

8. That the said sum of P159,960.00, assessed as customs duty payable on said repairs to said S. S. "Venus," upon being paid to, and received by, the In-

sular Collector of Customs, was covered into the Insular Treasury of the Philippine Government and became part of the general unappropriated funds of the Insular Government, in accordance with Section 14, Chapter III, of Act No. 2935, notwithstanding the protest made by the petitioner against its payment.

9. That to meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 1515.

10. That the duty and responsibility to examine, audit, settle and revise all accounts and claims for refund of customs duties rest solely and exclusively with the respondent Insular Auditor.

11. That immediately upon receipt of the aforesaid decision of the Insular Collector of Customs, on protest No. 14061, the respondent Insular Auditor in pursuance of the powers and duties thus entrusted to him by law as hereinabove alleged, made or caused to be made inquiries and investigations for the purpose of ascertaining and verifying the correctness and veracity of the assertions that the repairs made on the S. S. "Venus" at the Port of Hongkong could not have been executed in the Philippine Islands, and to thereby enable him to determine whether the refund ordered by the Insular Collector of Customs in his decision, or the payment for which credit is claimed, was actually to be made for objects or purposes authorized by Act No. 357 as amended by Act No. 1515, and for the accomplishment of which the particular appropriation in said Act is available.

12. That thereafter on November 6th, 1924, the respondent Insular Auditor, being convinced that adequate facilities for the repairs made on the said S. S. "Venus" are afforded in the Philippine Islands and conscious of the duties and responsibilities entrusted to him by the Jones Law, sent a letter to the Insular Collector of Customs requesting reconsideration of his decision on protest No. 14061 on the ground that it is openly and mani-

festly contrary to the weight of the evidence in this case, and to the provisions of par. 200, Sec. 8, and par. 348, Sec. 11 of the Philippine Tariff Act of 1909, as construed and applied by this Honorable Court in the case of Gutierrez Hermanos v. Collector of Customs, 39 Phil. 876.

13. That on the following day, November 7th, 1924, the respondent also wrote the Honorable the Secretary of Finance of the Philippine Islands, furnishing him with a copy of the aforesaid letter sent by him to the Insular Collector of Customs on November 6th, 1924, and requested said Secretary of Finance to have the aforesaid decision of the Insular Collector of Customs on Protest No. 14061 reviewed by the Court of First Instance in the City of Manila, in the event that the Insular Collector of Customs refused to reconsider his said decision.

14. That on November 12th, 1924, the respondent Insular Auditor, having obtained additional evidence as a result of the investigation and inquiries made that adequate facilities are afforded in the Philippine Islands for the repairs of the S. S. "Venus," reiterated to the Secretary of Finance, the respondent's former request to have the cause removed to the court for review, reminding him that the period within which he could order such removal was to expire on November 14th, 1924.

15. That on November 14th, 1924, the respondent again addressed another letter to the Insular Collector of Customs, furnishing him with additional written proofs demonstrating the incorrectness of his findings and decision, and at the same time requesting him to again review said decision in the light of this newly found evidence, with the idea of assessing and collecting duties on the repairs made on said S. S. "Venus," that could have been executed in the Philippine Islands.

16. That to the two communications of November 7th and 12th, 1924, sent to the Secretary of Finance, the respondent Insular Auditor received from him no reply

nor any other information whatever in connection therewith.

17. That from the Insular Collector of Customs, the respondent likewise received no answer to the two letters of November 6th and 14th, 1924, addressed and delivered to him. On the contrary, the Insular Collector of Customs, on November 26th, 1924, presented to the respondent for counter-signature warrant No. 210175 drawn in favor of the petitioner for the sum of P159,-960.00, said warrant being for the refund of the import duty, entry No. 316654-A, Protest No. 14061, theretofore assessed and collected from said petitioner.

18. That on November 28th, 1924, the respondent returned to the said Insular Collector of Customs the aforesaid warrant No. 210175 for P159,960.00, and informed him that no action thereon could be taken until after the request of the respondent for the reconsideration of the decision of said Insular Collector of Customs on Protest No. 14061, had been passed upon by him.

19. That on the same day, November 28th, 1924, the said Insular Collector of Customs returned the respondent's request for reconsideration of November 6th, 1924, stating that he finds no justification for reconsidering his decision of October 31st, 1924, on said Protest No. 14061.

20. That at the time the herein petition was filed the respondent had not yet finally decided whether or not he would approve and countersign said warrant No. 210175, for the sum of P159,960.00 drawn in favor of the petitioner.

IV

That as a further and special defense the respondent alleges:

1. That the court has no jurisdiction of the subject of the action.

V

That as a further and special defense the respondent says:

That the petitioner has another plain, speedy, and adequate remedy in the ordinary course of law, without resorting to mandamus proceedings, by appeal from the decision of the Insular Auditor first to the Governor-General and second to the Secretary of War.

WHEREFORE, the respondent prays that the petition be dismissed with costs against the petitioner.

Manila, P. I., February 10th, 1925.

(Sgd.) BEN F. WRIGHT,
Respondent,
Bureau of Audits,
145 General Solano, Manila.

Received copy this 10th
day of February, 1925.
FISHER, DEWITT, PERKINS & BRADY,
By (Sgd.) J. ORTEGA,
Attorneys for Petitioner.

On February 11, 1925, the Supreme Court issued the following resolution:

> "The respondent in case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., having filed his answer to the complaint filed therein, it is ordered that the hearing of said case be set for Tuesday, February 17, 1925, at 9:00 o'clock a. m."

On February 17, 1925, the Petitioner by his attorneys filed the following demurrer to the answer:

(CAPTION AND TITLE OMITTED)

DEMURRER

Comes now the petitioner in the above-entitled cause, by its undersigned attorneys, and respectfully demurs to the answer of the respondent herein on the ground

That the facts stated therein are not sufficient to constitute a defense.

ARGUMENT

THE PLEADINGS

The respondent's answer consists, in part, of allegations constituting a disquisition on his conception of his powers as auditor, of his opinion as to the existence of any other adequate legal remedy and of his opinion as to the jurisdiction of this Court—all of which are conclusions of law. It is our purpose here to show that the facts alleged in the petition and admitted in the answer, plus the *facts* set up in the answer, do not afford the respondent any defense, and that, indeed, because of the admissions in the answer, the petitioner is entitled on the pleadings, to the relief prayed for in the petition.

These facts may be summarized briefly as follows:

That the Insular Collector of Customs, on or about October 20th, 1924, assessed and made demand on the petitioner herein for the payment of P159,960, Philippine Currency, as the duty on certain heavy repairs and reconstruction work done to the S. S. "Venus" in Hongkong during 1924; that the petitioner paid said sum to the said Collector, under protest, on the ground that said repairs were not dutiable under the provisions of Paragraph 200 of the Philippine Tariff Act of 1909, as amended; and that on October 31st, 1924, after hearing the Insular Collector of Customs rendered a decision sustaining said protest and ordering the refund of said P159,960 to the petitioner. The following is a copy of said decision:

> "Protest No. 14061.
>
> "In the matter of Protest Numbered 14061, filed October 24, 1924, by Ynchausti & Co., Manila, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty

on cost of repairs to S. S. 'Venus,' Entry No. 31654-A, Voucher No. 39138, paid October 24, 1924.

"DECISION

"This protest is against the assessment of duty on cost of repairs made at Hongkong to the steamship 'Venus' of Ynchausti & Co., Manila, under paragraph 200 of the Philippine Tariff Act of 1909 at fifty per centum ad valorem instead of exempting the same from duty by virtue of the provisions of paragraph 200 and 348 of the said Tariff Act.

"The only question to be considered in this case is whether the repairs are entitled to free duty or not, or whether adequate facilities exist in the Philippine Islands for carrying out such repairs or not. In order to give the protestants an opportunity to prove their claim, a hearing was held on October 27, 1924, and the following evidence was produced:

"A letter of Fernandez Hermanos to Mariano Yenko, Marine Surveyor, acting as Marine Superintendent for Ynchausti & Co., dated March 8, 1924, in which the former state that they cannot construct a boiler for the S. S. 'Venus.' (Exhibit 'A').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Mariano Yenko, dated February 18, 1924, stating that they are unable to construct a new complete boiler, but that they have a powerful derrick to remove the old one and place a new one (Exhibit 'B').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated September 25, 1924, informing the latter that the maximum lifting capacity of their floating derrick is 25 tons (Exhibit 'C').

"A letter of Carlos Pombo to Ynchausti & Co., dated October 9, 1924, advising that it is impossible to construct a boiler with cylinder and a thrust shaft for the 'Venus' in the Philippines (Exhibit 'D').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated October 10, 1924, certifying that their shops have no adequate facilities to make H. P. cylinder and thrust shaft

with thrust blocks for S. S. 'Venus.' They also correct the statement contained in their letter of February 18, 1924, Exhibit 'B,' to the effect that they found out that the 'Venus' boiler is too heavy for their derrick (Exhibit 'E').

"A certificate of the Hongkong & Whampoa Dock Co., Ltd., stating the weights of the component parts of the boiler built by the same for the 'Venus' (Exhibit 'F').

"A letter of C. B. Nelson, Marine Surveyor, to Ynchausti & Co., dated October 15, 1924, stating that no vessel of the size of the S. S. 'Venus' has been reconstructed at this port and has 'such extensive repairs carried out,' and that the main boiler and thrust shaft could not be made at Manila (Exhibit 'G').

"The statements contained in the above letters and certificates have been confirmed by the parties subscribing the same, at the hearing, and have been corroborated by the Chief of Hull and Boiler Division of this Bureau. The lack of adequate facilities is, therefore, clearly established and the undersigned is convinced that the repairs to and reconstruction of the steamship 'Venus' could not be effected in the Philippine Islands.

"This case is identical with that of Fernandez Hermanos vs. the Insular Collector of Customs (R. G. No. 8667, Vol. 30, page 50, of Philippine Reports) and the decision thereon applies hereto.

"Protest No. 14061 is, therefore, for the foregoing reasons sustained and a refund of the customs duty collected is ordered to the protestants.

"(Sgd.) V. ALDANESE,
"*Insular Collector of Customs.*"

That on the same day the respondent received a copy of said decision, and, because he did not agree therewith, besought the Insular Collector of Customs to reconsider the same and the Secretary of Finance to order the removal of the record in the matter to the Court of First Instance of Manila under the provisions of Sections 1383, 1384 and 1386 of the Administrative Code for the review of said decision; that the Insular Collector of

Customs failed to act on his request to reconsider said decision and the Secretary of Finance failed to order the removal of the record to the Court of First Instance for review of said decision, as provided in Section 1386 of the Administrative Code; that on November 26th, 1924, the Insular Collector of Customs presented a warrant to respondent, drawing in favor of the petitioner herein, for P159,960, for the refund of said duty so paid under protest, for counter-signature; that respondent returned said warrant without countersignature because no action had been taken on his request for reconsideration; whereupon the Insular Collector of Customs returned said request for reconsideration, denying the same; and that, at the time this petition was filed, respondent had not yet finally decided whether or not he would approve and countersign said warrant.

THE LAW

Our propositions are:

(1) The Philippine Tariff Law, as amended, vests the Insular Collector of Customs with the absolute and exclusive power of determining, in a given case, the dutiability of repairs and construction work effected abroad on vessels of Philippine Registry.

(2) The Collector's decision in this case has become final and binding upon the Government of the Philippine Islands, because the Secretary of Finance failed to order the removal of the record to the Court of First Instance of Manila for the revision thereof.

(3) The Collector's decision on the question involved in the protest was right.

(4) The petitioner has no other adequate remedy, other than that herein prayed for.

(5) This Court has jurisdiction.

Of these in their order:

(1) *The Philippine Tariff Law, as amended, vests the Insular Collector of Customs with the ab-*

solute and exclusive power of determining, in a given case, the dutiability of repairs and construction work effected abroad on vessels of Philippine registry.

A glance at the history of the statute, and of the decisions of this Court thereon will be illuminating.

The original statute read as follows:

"Sec. 8. That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States or any of its possessions except as otherwise provided in this Act, shall be as follows:

* * * * *

"200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem.

"*Provided*, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and

"*Provided further*, That if the owner or master of such vessel shall furnish evidence satisfactory to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Philippine Islands, such duty shall not be imposed; and

"*Provided further*, That furnishings, stores, and supplies, not otherwise provided for, purchased abroad and imported in such vessels shall be dutiable under the corresponding paragraphs of this Act.

"The expression 'imported into the Philippine Islands,' shall be held to mean 'brought into the

jurisdictional waters of the Philippine Islands in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail, or other motive power."

Sec. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph:

* * * * *

"348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the collector of customs that adequate facilities of such repairs are not afforded in the Philippine Islands."

There have been two leading decisions of this Court construing the statute above quoted. The first of these decisions is Fernandez Hermanos *v.* Insular Collector of Customs, 30 Phil. Rep. 50. The question there was whether, where a part of the repairs could be effected in the Philippine Islands, and the whole job is done abroad, any part of the repairs so effected are dutiable. This Court, after quoting the statute, answered the question in the negative, and, in so doing, made use of the following language:

"The fundamental defect in the position of the Government is that it divides the repairs which a vessel undergoes into two parts, one of which is composed of those which *can* be made in the Philippine Islands, and the other which can *not* be made in the Philippine Islands. The statute itself makes no such division and we see nothing therein which authorizes it. The Act speaks of the repairs as a whole. No matter how many items compose the repairs, an indivisible whole with which the Act concerns itself and upon which it imposes or does not impose import duties. If the repairs cannot be made in the Philippine Islands, then they can be made in a foreign country and, having been made there, may come

in free of duty. If they can be made in the Philippine Islands, then, if they are made in a foreign country, they cannot come in free of duty. It is distinctly unauthorized by the terms of the law to divide the repairs into two parts and to impose duties on one part and not on the other. Furthermore, such a distinction is unreasonable, if not impossible, and leads to unjust and offensive results."

The respondent seems to think that the second decision operated to modify this doctrine. That decision is Gutierrez Hermanos v. Collector of Customs (39 Phil. Rep. 876.) That the respondent is mistaken in his contention as to the effect of that decision is apparent from a mere reading thereof, and of the discussion therein of the Fernandez Hermanos decision. The pertinent language follows:

"We are not disposed at this late date to discuss and resolve anew the questions presented in the Fernandez Hermanos case. We are, however, not inclined to extend principles which appear to have been carried to the utmost limit by this opinion so as to include thereunder cases that the law certainly did not contemplate. While the rights of the shipowner must not be neglected, so also must the public interest be protected. A Tariff Law intended to foster home industry must be permitted to serve its purpose.

"The two cases are not the same. In the Fernandez Hermanos case there was no dispute that it was impossible to effect certain of the repairs in the Philippine Islands. In the case at bar there is likewise no dispute that the Philippine Islands had adequate facilities for all of the repairs with the exception of the manufacture of the tail shaft. The Government insists, and we think it is established, that the job could have been completed in the Philippine Islands if the tail shaft had been obtained elsewhere. If the parts and pieces necessary for the repair of ships can be obtained in other ports and installed in the Philippine Islands the protective aims of the Tariff Law are fulfilled. If, however, a shipowner

can on the slightest excuse have one small part made in a foreign port in order to have all the repairs made there, then the intent of the Legislature is frustrated."

The date of the Gutierrez Hermanos decision was March 31, 1919. Apparently, fearing that the decision of this Court in the latter case would lead to restrictive administrative interpretation that, in turn, would injure shipowners and the public, the Legislature, acting under the authority contained in Section 10 of the Jones Law, enacted its Act No. 2872, approved Nov. 24th, 1919, amending the above quoted provisions of Paragraph 200 of Section 8 of the Tariff Law of 1909, to read as follows:

"200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorum until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorum on and after January first, nineteen hundred and twenty-five.

"*Provided*, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and

"*Provided further*, That if the owner or master of such vessel shall furnish evidence satisfactory to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Philippine Islands, such duty shall not be imposed; and

"*Provided further,* That furnishings, stores, and supplies, not otherwise provided for, purchased abroad and imported in such vessel shall be dutiable under the corresponding paragraphs of this Act.

"The expression 'imported into the Philippine Islands' shall be held to mean 'brought into the jurisdictional waters of the Philippine Islands, in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail, or other motive power.' "

This Act was approved by the President of the United States and was put into effect by proclamation dated December 11, 1919.

The result is that whatever there may be in the respondent's somewhat unusual views about his own powers, as derived from the Jones Law, we have Act 2872, approved by the President of the United States, and enacted under express authority contained in that same law, whereby the decision of the dutiability of repairs effected abroad on vessels documented for the Philippine trade is vested exclusively in the Insular Collector of Customs. To that extent, certainly, Act 2872 operates to divest the respondent of the powers he now claims in virtue of the Jones Law with respect to questions such as the one here at issue.

Respondent seems to think that if the repairs—or any of them—under the Gutierrez Hermanos decision—could in any way be effected in the Philippine Islands, then at least such repairs, effected abroad, are dutiable. But such is not the case. The Collector is vested with the exclusive power to determine, under Act 2872—

(1) The adequacy of the facilities;

(2) Whether the facilities are such that the repairs *can be done here reasonably economically, and within a reasonable time.*

In this case, he has found those issues adverse to the Government, as, by the above quoted provisions of the

law, he was empowered to do—and his decision is absolutely binding on all administrative officers of the government. It was *not* the duty of respondent to interfere—or question the decision—or go running about town seeking for proofs to upset the decision—or to withhold counter-signature to the warrant, because he disagreed therewith. It was his duty, a purely ministerial one, to determine whether such a decision had been rendered, and, upon ascertaining that fact, to countersign the warrant, thereby making the decision effective.

Respondent seems to take the position that the Jones Law vests him with absolute power in such matters as these, in the exercise of which he may reverse the decisions of all other administrative officials of this government and may deny the jurisdiction of this court. In other words, all protests decided by the Collector of Customs and the Collector of Internal Revenue are subject to review and to reversal by him, either on questions of fact or law. Such extravagant claims to be sustained, would have to be pretty clearly expressed in the governing statute—and the Jones Law certainly does not support him in this contention. Thus, Section 24 of the Jones Law provides:

> "The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States, and the Comptroller of the United States Treasury," * * *

This provision of the organic law is both a *grant* and a *limitation* of authority. This Court so held in Compania General de Tabacos de Filipinas v. French (39 Phil. Rep. 48) in the following language:

> "Section 24 of the Jones Law confers upon the Insular Auditor 'like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States

Treasury,' except as otherwise expressly provided in that Act. This grant of authority is, we believe, to be construed as *limiting* as well as *conferring* authority, and that unless the authority now asserted by the Insular Auditor has been conferred upon similar officials of the United States, it has not been conferred upon him by the Jones Law."

Now, it has been repeatedly held that, where such discretion is vested in another officer as is here vested in the Collector of Customs, his decisions with respect thereto are controlling upon the accounting officials of the Government, and that their duty to execute and carry out the decisions is purely ministerial.

"The reason alleged for this refusal by the accounting officer is, that by his construction of the second section of the Act of 3rd of March, 1835, ch. 27, the Secretary of the Navy had no authority to make such appropriation of the funds of the government in his hands. * * *

"Notwithstanding an opinion of a late Attorney-General to the contrary, the accounting officer 'entertains no doubt' that the expenses * * * are among the 'allowances' prohibited by this Act, and has consequently felt bound to repudiate the Secretary's construction of the law, and his opinion as to the powers and duties of his Department.

* * * * *

"The Executive Department of the government, to which is intrusted the control of the subject matter, must necessarily determine all questions appertaining to the employment and payment of such temporary agents, and exigency which demands their employment. The Secretary of the Navy represents the President and exercises his power on the subjects confined to his Department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and laws, do not require the approval of any officer of another department

to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments."

(United States v. Jones, 18 How. 92; 15 L.Ed. 274.)

"What was said in United States v. Jones, 59 U. S. 92, 18 How. 96, may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the secretary of the navy in approving certain disbursements made by an officer of the navy in conformity with the orders of the secretary. This court said: 'The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.'"

(United States v. Johnston, 124 U. S. 196 31 L.Ed. 389.)

"Where the law has appointed another officer or tribunal to examine and certify claims against the state and has made such certificate conclusive, the duty of the Auditor or other proper officer to draw a warrant for the payment thereof is purely ministerial, and enforceable by mandamus."

(19 Am. & Eng. Cyc. L. p. 787, citing numerous cases; People ex rel New York Cent. & H. R. R. Co. v. Walsh, 144 N. Y. S. 367; In re Freel, 148 N. Y. 165, 42 N. E. 586; Bodine v. McDaniel Auto Co., 170 Pac. 899; Hopley v. Benton, 38 Okl. 223, 132 Pac. 808; Clark v. Warner, 204 Pac. 929.)

"On the other hand, it must be conceded that when there is an available fund, duly appropriated for the purpose, the Auditor cannot question the validity or regularity of the acts of any

other officer or tribunal authorized to pass upon and certify the justness of the claim covered by the appropriation. He acts in a ministerial capacity in issuing warrants upon mandamus to act when he wrongfully refuses to do so."

(Danley, Auditor v. Whitely, 14 Ark. 687.)

"It is not within the province of the accounting officers of the Treasury to construe the pension laws and give instructions to pension agents as to the payment of pensions. This properly belongs to the Commissioner of Pensions, whose duty it is, under the direction of the Secretary of the Interior, to administer these laws. The certificate and his orders as to its payment are binding upon the Comptroller and Auditor."

(1882) 17 Op. Atty. Gen. (U. S.) 339, 340;
(1888) 19 Op. Atty. Gen. (U. S.) 214;
(1891) 20 Op. Atty. Gen. (U. S.) 178.

"The heads of Departments have a rightful authority to direct allowances to be made, or to reject claims for allowances, in settling and adjusting accounts relating to the business of their respective departments; and such directions and rejections ought to be conformed to by the Auditors and Comptrollers respectively."

(1852, 5 Op. Atty. Gen. (U. S.) 630, 656.)

"Where a vessel in the Navy has been unheard from so long that her wreck may be presumed, the determination by the Secretary of the Navy of the day when the wreck, destruction, or loss shall be deemed to have occurred is binding upon the accounting officers of the Treasury Department in settling the accounts of seamen and others, not officers, borne on the books of the vessel."

(1921, 32 Op. Atty. Gen. (U. S.) 427.)

"Mandamus will lie to compel the refunding of moneys illegally collected of individuals where the law requires such refunding; and this in the case of taxes on exempt property, even though the exemption depends upon matters of fact

which he is to inquire into and pass upon. The refunding in such a case is a mere ministerial duty; the officers are supposed to know the law, and it is their duty to apply it to the facts as they find them."

(4 Cooley, On Taxation, sec. 1606, p. 3211.)

In conclusion, then, we submit that, under the provisions of Act 2872, amending the Tariff Law of 1909, the Collector of Customs was vested with absolute and exclusive jurisdiction to decide the question of the dutiability of repairs such as those here in question, effected on the S. S. "Venus," and that his decision thereon is absolutely binding on the respondent. It was the respondent's duty, a purely ministerial one, to sign the warrant.

(2) The Collector's decision in this case has become final and binding upon the Government of the Philippine Islands, because the Secretary of Finance failed to order the removal of the record to the Court of First Instance of Manila for the revision thereof.

This proposition does not require extended treatment. It follows as an inevitable conclusion from a reading of Sections 1384, 1386, and 1383 of the Administrative Code. These sections are as follows:

Section 1384. *By whom cause may be removed into Court.*—The removal of a cause into court may be had at the instance of the protesting party or, in case of seizure, at the instance of the owner or agent of the seized property. If the decision of the Insular Collector is adverse to the Government, the cause may also be removed, in the manner hereinafter specified, by order of the Department Head.

Sec. 1386. *Removal upon order of Department Head.*—Upon making any decision which may be removed upon the order of the Department Head, the Insular Collector shall immediately transmit a copy of such decision to him and also to the Insular Auditor; and if within fifteen days thereafter the Department Head shall certify that in his opinion the decision ought to be revised by the Court of First Instance in the city of Manila, it shall be the duty of the

Insular Collector, upon notification thereof, to transmit the original record to said court in the same manner as upon removal by a party other than the Government.

Sec. 1383. *Review in Court of First Instance.*— The party aggrieved by the decision of the Insular Collector in any matter brought before him upon protest or by his action or decision in any case of seizure may procure the cause to be removed for review into the Court of First Instance sitting in the city of Manila, in the manner and within the period hereinafter prescribed.

Unless the proper party in interest shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him.

But respondent may argue that these provisions are contrary to the powers conferred upon him by the Jones Law, and that he, being so keenly "conscious of the duties and responsibilities entrusted to him" by that law, is bound to ignore the clear provisions of the Administrative Code above quoted.

Our answer is that, if the Administrative Code has effected any changes in the administration of the Tariff Law, so far as affected by the Jones Law, then, inasmuch as it postdates the Jones Law, and was approved by the President of the United States on October 1, 1917 (*In re* McCulloch Dick, 38 Phil. Rep. 41, 81), it prevails over the Jones Law under the express provisions of Section 10 of that Act expressly authorizing the Philippine Legislature, with the approval of the President of the United States, to enact amendments of the Tariff Law.

It is submitted, then, that the decision of the Insular Collector of Customs here in question has, for failure to remove the same within the statutory period, become final, and, therefore, conclusive upon the Government of the Philippine Islands, and it is the plain ministerial duty of respondent to recognize the finality and conclusiveness thereof, and to execute the same.

(3) *The Collector's decision on the question involved in the protest was right.*

The pleadings do put in issue the question of the existence of adequate facilities in the Philippine Islands, for the economical accomplishment of the repairs here involved. We feel that this Court and the respondent are bound by the decision of the Collector thereon, but we do want the Court to know that the Collector's decision is right on the facts and on the law. The decision shows clearly that the repairs consisted largely of the construction and installation of a large boiler, with cylinder and thrust shaft. Plenty of evidence was offered that such a boiler and thrust shaft could not be built and installed in the Philippines, and that the other repairs effected were incidental to the ripping out of the old boiler and thrust shaft and the installation of the new. In other words, that portion of the work for which no facilities whatever were offered in Manila, entailed the practical tearing down and rebuilding of the entire ship.

This brings the case well within the doctrine of the Fernandez Hermanos case—and well without the doctrine of the Gutierrez Hermanos case, to which we have already referred, even if the statute had not been changed. In the Fernandez Hermanos case the facts were that a substantial portion of the repairs could not be effected in the Philippine Islands—and the decision was that, in such case, the repairs could not be segregated but should be treated as a unit, and exempted from the duty. There was no question of interfering with the findings of the Collector in that case, as he expressly found that no adequate facilities existed in the Philippine Islands for certain of the repairs in question. In the Gutierrez Hermanos case, the question was whether the fact that one small part of the repairs could not be effected in the Philippine Islands would justify the shipowner in seizing upon the opportunity to have large repairs effected for which facilities exist in the Philippine Islands.

We submit that ours is the former case. The building of a boiler to replace one already in place—of a thrust shaft and cylinder, are such tremendous changes in the ship that they cannot be regarded in any sense, as the building of "one small part" thereof, such as the Court found to be the situation in the Gutierrez Hermanos case.

Moreover, since the latter decision was handed down, the law has been changed, as we have already pointed out. Now, it is not a question whether adequate facilities exist whereby the repairs may *possibly* be effected, but whether adequate facilities exist whereby the work can be done *reasonably economically* and in a *reasonable time* in the judgment of the Insular Collector of Customs.

Now, we submit that it would be the height of folly to ask the owners to have just that amount of work done in the "Venus" in dry dock in Hongkong, that could not possibly be done here, and then bring her to Manila to have the balance effected. There can be no such economical division of the work. Many repairs can be carried on simultaneously. Would it be economy to compel the shipowner to postpone such of those repairs as could be effected here, until the completion of the other repairs and her arrival here, entailing putting the ship on the slipway again, with additional expense and loss of time.

No consideration of public policy is subserved by thus increasing the maintenance expense of the ships engaged in our interisland trade. So, to increase them is to throw an added burden on the public in the way of rates, because such expenses must, in the last analysis, be met by the shipping and travelling public.

We submit, then, that apart from the question of the conclusiveness of the decision of the Collector of Customs, which we have already dealt with, the decision was intrinsically right, and should have been sustained and executed without question.

(4) *The petitioner has no other adequate remedy other than that herein prayed for.*

(5) *This Court has jurisdiction.*

If respondent has in mind the administrative appeal to the Governor-General in alleging that we have another adequate remedy, and that this Court has no jurisdiction, that contention has already been settled by this Court in Compania General de Tabacos *v.* French (39 Phil. 29, 57). The language on this point was as follows:

> "But it is argued that the action cannot be maintained because it does not appear from the petition that the petitioner has appealed from the action of the Insular Auditor to the Governor-General. In section 653 of the Administrative Code (1917) it is declared that any person aggrieved by a decision of the Insular Auditor may, within one year, appear to the Governor-General. In Section 656 it is declared that the action of the Governor-General affirming the Auditor's decision shall be final; but if he reverses the Auditor, the matter goes to the Secretary of War whose decision shall be conclusive. Provisions to the same effect are found in the Jones Law, sections 24, 25. It is our opinion that the word 'final,' as used in section 656 of the Administrative Code in speaking of the action of the Secretary of War, has reference to the finality and conclusiveness of the proceedings in an administrative sense—that is, final and conclusive upon the executive branches of the Government. In other words, section 656 follows the tenor of section 655 where it is said that the decision of the Insular Auditor shall be conclusive, subject to appeal or review as in section 656 provided. It results that the proceedings under section 653 to 656, inclusive, of the Administrative Code (1917) are at no stage binding upon the courts, whether an administrative appeal is taken or not. The circumstance that no appeal to the Governor General was taken by the petitioner in the instant case is, therefore, immaterial so far as the judicial solution of the controversy is concerned. By its election not to take the matter before the Governor-General, the petitioner left the decision of the Insular Auditor, in effect,

considered as an administrative decision, and section 653, as we have already seen, defines the effect to be given to it. The petitioner, of course, was bound to await action by the Insular Auditor because, until this officer acted, it could not be known that the petitioner's claim was questioned. The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts."

Something bearing on the question was also said in the recent case of Zobel *v.* The City of Manila, G. R. No. 22201. The language is as follows:

> "Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first installment of the purchase price; and it is insisted for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. *The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Government must be considered to be qualified* as regards the contract rights of persons dealing with the City by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor shall possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

Paraphrasing the above language, we also say:

"The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Govern-

ment must be construed to be qualified—by the specific provisions of the Tariff Law of 1909, as amended by Act 2872, vesting in and conferring upon the Insular Collector of Customs, the absolute power of determination of the facts on which the question of the dutiability of repairs effected abroad on vessels of Philippine documentation depend.

We submit, then, that the failure to prosecute an administrative appeal is not a bar to the remedy herein sought, and does not oust this Court of its jurisdiction.

There is a concluding paragraph in the respondent's first special defense, that we are at a loss to understand, coming as it does from a supposedly responsible official. It is to the effect that, on the date of the petition, he had not as yet made up his mind what action he was going to take with respect to the warrant. We are prepared to show that he did, definitely, on December 31st, 1924, decline to countersign said warrant, and did, definitely and finally return the same to the Insular Collector of Customs, at the same time advising the Insular Collector of Customs of his rather exaggerated views as to the measure of his own powers. At least the allegation shows that, on the filing of the petition he had failed to countersign the warrant, and surely it may not be contended that the petitioner is bound to wait for the performance of the Auditor's ministerial duty to countersign the warrant until some mental process is evolved in his brain which he will be pleased to christen "a final decision." Substantial and undoubted rights may not thus be withheld indefinitely, at the whim of any man, be he official or otherwise. No, whatever his mental state of indecision may be, and we can well appreciate that he must have the gravest doubts about the soundness of his views, we are not bound thereby, but rather by his outward definite refusal to countersign the warrant.

In conclusion, we believe that the case can be disposed of on the pleadings. There is one point about which

there may, however, be some question. The Auditor's answer only admits, *by implication*, that the decision was forwarded to the Secretary of Finance and that the latter has failed for fifteen days thereafter, to order the removal of the record to the Court of First Instance of Manila for the revision thereof. All the allegations of the petition are specifically denied in the answer, except those *expressly* admitted. Moreover, the grounds on which petitioner based its protest are not admitted in the answer. And finally, of course, issue is made as to the existence of adequate facilities in the Philippine Islands for the repairs in question.

It is obvious that respondent is of the opinion that the complaint states a good cause of action, otherwise he would have demurred. The effect of his answer is to raise the above issues of fact, for which, unless the admissions of his answer are regarded as sufficient to dispose of the case, a commissioner should be appointed to receive the testimony.

We submit, in conclusion, that the respondent is asserting powers in this case that are subversive of our whole scheme of government here; he claims to be the supreme arbiter of all claims such as the one here in question, and that other officials charged with the decision thereof under specific provisions of the law render such decisions subject to review by him, notwithstanding the specific provisions of law providing for the review thereof by the courts.

We submit that this position is absolutely untenable; that the demurrer herein should be sustained; and judgment on the pleadings rendered in favor of the petitioner herein for the remedy prayed for.

Respectfully submitted,

FISHER, DEWITT, PERKINS & BRADY,

By (Sgd.) C. A. DEWITT.

Manila, P. I.,
February 17, 1925.

After a thorough discussion of the question on the day of the hearing, February 17, 1925, by both parties who presented their arguments orally and in writing, the Supreme Court passed the following resolution:

> "At the hearing of case No. 23601, Ynchausti & Co. vs. Ben. F. Wright, etc., there appeared attorney DeWitt for the petitioner and attorney Emiliano Remo for the respondent. The court granted the respondent ten days within which to file a memorandum therein and the petitioner ten days from the date he receives copy of the respondent's memorandum."

On February 27, the respondent filed his memorandum and attached thereto the following exhibits:

EXHIBIT "A"

Manila, P. I., March 8, 1924.

The Insular Collector of Customs,
Manila.

Sir:

I have the honor to request for opinion as to whether the general repairs to be made on the hulls of the S. S. "Venus" in Hongkong will be subject here to the payment of import duties. For your information, I have to state that the said vessel will be sent to that port where new boiler will be installed in place of the old one. In removing the main boiler, the hulls will necessarily be opened, and all defective parts repaired or renewed, thus the reconstruction or general repairs of the hulls will be inevitable. The repairs to be made in the hulls will be for the seaworthy, safety and economical operation of the ship. I am of the opinion that said repairs are exempt from payment of duties following the doctrine laid down by the Supreme Court in the case of Fernandez Hermanos vs. Collector of Customs (30 Phil. Rep. 50), regarding repairs made on the S. S. "Islas Filipinas," in foreign port.

Hoping to receive a reply at your earliest convenience, I remain,

Respectfully,
(Sgd.) MARIANO YENKO.

EXHIBIT "B"

March 13, 1924.

Mr. Mariano Yenko,
Marine Surveyor,
104 Dasmarinas, Manila.
Sir:

I beg to acknowledge receipt of your letter of the 8th instant, asking for opinion as to whether or not the general repairs to be made on the hulls of the S. S. VENUS in Hongkong will be subject to the payment of import duties in the Philippine Islands. You state that the vessel will be sent to Hongkong for the installation of a new boiler in place of the old one, and that in removing the main boiler the hulls will necessarily be opened and all defective parts repaired or renewed, thus making the reconstruction or general repairs of the hulls inevitable.

In order that repairs made in foreign countries to vessels documented in the Philippine Islands may be admitted free of duty, the law provides that it must be proven to the satisfaction of this office that adequate facilities are not afforded in the Philippine Islands for such repairs. Evidently as an attempt to prove in advance that adequate facilities do not exist in the Philippines, you forwarded a letter from the Earnshaws Docks & Honolulu Iron Works stating that their shops are unable to construct a complete new boiler for the VENUS due to the lack of proper facilities, but that they are fully equipped to remove the old boiler and install the new one in its place and make all the necessary repairs. Accordingly, if the new boiler can be obtained somewhere, the installation thereof can be done in the Philippine Islands, as well as incidentally all repairs on the hulls. It, therefore, follows, that, with the new boiler on hand, adequate facilities are afforded in this country for the repairs in question.

In the case of Gutierrez Hermanos vs. Collector of Customs, 39 Phil. Rep. 876, the Supreme Court declared that the Tariff Law was intended to foster home industry and that it must be permitted to serve its purpose. The following conclusions were laid down:

"If the parts and pieces necessary for the repair of ships can be obtained in other ports and installed

in the Philippine Islands, the protective aims of the Tariff Law are fulfilled. If, however, a ship-owner can on the slightest excuse have one small part made in a foreign port in order to have all the repairs made there, then the intent of the Legislature is frustrated."

While it is true that a ship's boiler is not a small piece, yet a boiler for a vessel of less than 1,000 gross tons is capable of being imported into the Philippine Islands. Articles of this kind to be used in the construction, equipment or repair of vessels are entitled to free entry under Paragraph 349 of the Tariff upon compliance with the corresponding regulations.

In view of all the foregoing, the undersigned is of the opinion that all repairs made to the VENUS in Hongkong, with the exception of the installation of the new boiler, are subject to the payment of duty.

Respectfully,

V. ALDANESE.
Insular Collector of Customs.

EXHIBIT "C"

The Government of the Philippine Islands
Department of Finance
BUREAU OF CUSTOMS
Manila

October 27, 1924.

Hearing in the matter of Protest No. 14061, filed by Ynchausti & Co., against the payment of duties on materials used in the reconstruction of the S. S. "Venus."

Present: Mr. F. Corrales, Secretary, Board of Protests & Appeals; Mr. Mariano Yengko, representing Messrs. Ynchausti & Co.; Messrs. Carlos Pombo and C. B. Nelson, Marine Surveyors; Mr. Thomas Earnshaw, Manager, Marine Plant, Earnshaws Docks and Honolulu Iron Works; and Mr. Baxter, Chief of Hull & Boiler Division.

QUESTIONS BY MR. CORRALES,

STATEMENT OF MR. YENGKO
Duly Sworn.

Q. What is your name and occupation? A. Mariano Yengko, Marine Surveyor.

Q. What connection have you with Ynchausti & Co.? A. In this case as marine superintendent for the company.

Q. In connection with their Protest No. 14061 against the payment of the amount of P159,960.00 for duties assessed on the materials used in the reconstruction and repair of the S. S. "Venus," what statement do you want to make to show that these reconstruction and repairs could not be carried out in the Philippine Islands? A. I want to produce the evidence consisting of the testimonies showing that the reconstruction carried out on the S.S."Venus" at Hongkong Whampoa Dock Co., Ltd., Hongkong, was necessary in view of the fact that the repair shops in the Philippine Islands have no adequate facilities to do it. Attached to the protest against the payment made, there are the certificates of the parties affected and interested in this case who concur in my statement that there really exist no adequate facilities for undertaking such work. From the beginning it was already known positively that it was not possible to construct a boiler weighing 32 tons, a thrust shaft weighing 4 tons and a cylinder weighing 7 tons for the reason that these main parts composing the vessel's engine could not simply be done in the Philippines and for the further reason that if such a construction was made on board this steamer it would have been necessary to reconstruct also the main parts of the hull besides construction of new cabins to put it in condition as a passenger vessel, and this could not have been done in the Philippines as it was done in the said port. For these reasons, the company which I am representing decided to have the work carried out outside of the Philippine Islands in the conviction that the materials entering therein would be exempt from the payment of duty which would, otherwise, be subject thereto under the provisions of paragraph 200, section 8, and of paragraph 348, section 11, of the Philippine Tariff Act of 1909. I present personally the parties who have subscribed the certificates, Messrs. Tomas Earnshaw, Carlos Pombo and C. B. Nelson.

Q. Have all the materials, on which duties have been paid been employed in the repair and reconstruction of the S. S. "Venus"? A. Yes, sir.

Q. Attached to the entry No. 31654-A, Voucher No. 39138, there is an invoice of the Hongkong and Whampoa Dock Co., Ltd., of Hongkong showing the amount

of $300,004,90, Hongkong currency, purporting to cover the value of the materials used and the work made on the S. S. "Venus." Is this account correct? A. Yes, sir.

STATEMENT OF CARLOS POMBO

Duly sworn

Q. What is your name and occupation? A. Carlos Pombo, Marine Surveyor and constructing engineer.

Q. Here is a certificate signed by you, dated October 9, 1924. Is this your certificate and do you confirm the statement contained therein? A. Yes, sir.

Q. If you have sufficient knowledge of the work carried out on the S. S. "Venus," could you tell which parts of the vessel could not be constructed or repaired in the Philippine Islands? A. As I say in the certificate, the boiler, the cylinder and the thrust shaft could not be made in the Philippine Islands, although the rest of the work could have been done.

Q. Do you mean that there are no adequate facilities in the Islands? A. Yes.

STATEMENT OF MR. TOMAS EARNSHAW

Duly sworn.

Q. What is your name and occupation? A. Tomas Earnshaw, Manager, Marine Plant, of the Earnshaws Docks and Honolulu Iron Works.

Q. Is this your certificate? A. Yes, sir.

Q. Do you confirm your statement that there is no adequate facilities in the Philippine Islands to carry out such reconstruction? A. Yes.

Q. Is this certificate you refer to a letter of February 18, 1924, in which you state that this work could have been done in the Philippine Islands, and later that you are not equipped with a proper derrick for removing the old boiler and replacing a new one. Do you mean to say that the boiler of the S. S. "Venus" is too heavy for your derrick? A. Yes.

Q. With the exception of these main parts of the engine, could the other work have been carried out here? A. Yes.

STATEMENT OF MR. NELSON

Duly sworn.

Q. What is your name and occupation? A. C. B. Nelson, Marine Surveyor.

Q. Is this your certificate dated October 15, 1924? A. Yes.

Q. From what you have observed, was there any other vessel of the size of the S. S. "Venus" that was reconstructed or generally repaired in the Philippine Islands? A. Not to the same extent as the S. S. "Venus."

Q. Do you confirm your statement that the main boiler and thrust shaft could not be made in Manila? Yes, I do.

Q. Are you familiar with the facilities of the shops repairing vessels in the Philippines? A. Yes, sir.

Q. Are you also an inspector of the Bureau Veritas in which the vessel "Venus" is registered? A. Yes, I am acting surveyor of the Bureau Veritas.

TESTIMONY OF MR. BAXTER, Supervising Inspector of Hulls and Boilers, Bureau of Customs.

Q. Mr. Baxter, from your experience, could you tell whether all the works carried out on the S. S. "Venus" could have been done in the Philippine Islands or not? A. Not all.

Q. Are you familiar with the facilities of the work shops here for vessels? A. Yes.

Q. And from your experience as Supervising Inspector of Hulls and Boilers could you tell whether there are apparatus of sufficient capacity such as derricks and other important instruments, to lift heavy pieces and to carry out this work. A. No, there are none of sufficient capacity.

Q. Do you concur in the statements made by Messrs. Pombo, Earnshaw and Nelson and also of Mr. Yengko to the effect that we are lacking facilities in the Philippines to undertake such a big work? A. Yes.

Q. We take for instance the boiler, can you tell whether that boiler is too heavy for the Earnshaw's derrick? A. Yes, it is too heavy. It is about 10 tons over.

Q. And to lift or properly handle the thrust shaft, are there no adequate facilities? A. None.

I hereby certify that the foregoing is the true and correct transcription of the notes taken by me during the investigation held on the above-mentioned date.

(Sgd.) FELISA GOMEZ,
Stenographer.

EXHIBIT "D"

The Government of the Philippine Islands
BUREAU OF AUDITS
Manila

November 6, 1924.

The Insular Collector of Customs,
Manila.

Sir:

Under the provisions of Customs Administrative Order No. 125, dated June 15, 1921, I have the honor to request for reconsideration of the decision rendered on Protest No. 14061, filed by Messrs. Ynchausti & Company, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty on the cost of repairs made on the S. S. "Venus" at the Port of Hongkong, for the following grounds:

1. The decision of the Insular Collector of Customs is openly and manifestly against the weight of evidence, both oral and documentary.

2. The decision as rendered is manifestly against the provisions of law involved.

The decision as rendered is manifestly against the weight of evidence presented inasmuch as it is not entirely in accord with the salient facts brought out at the hearing as well as those embodied in the various certificates and letters presented to corroborate the findings at the hearing. After a careful perusal of the decision, one is forcibly led to arrive at the conclusion that no adequate facilities exist in the Philippine Islands for carrying out the repairs made on the S. S. "Venus," and therefore said repairs should be exempted from duty by virtue of the provisions of paragraph 200 and 348 of the Tariff Act of 1909. This conclusion is entirely different from that which can be adduced by going over the various certificates and letters as well as the record of the minutes of the

hearing. In the decision, it is stated that the lack of adequate facilities in the Islands is clearly established and that the repairs to and reconstruction of the S. S. "Venus" could not have been effected in the Philippines. At the hearing, various certificates and letters which are marked exhibits "A" to "G" were presented with a view to corroborate the statements made by the subscribers thereof. Almost all the certificates and letters referred to do not state that the repairs cannot be made in the Islands. To substantiate, in the letter dated October 9, 1924, of Mr. Carlos Pombo, Marine Surveyor, to Ynchausti & Company, it is stated in part:

> "* * * por hoy es imposible efectuar en Felipinas las citadas obras; pues los talleres existentes *son completos para reparaciones de cascos, maquinas, ejes, y calderas*, pero por ningun concepto para la construction de dichos organos, por carecer de elementos para estos trabajos." (See Exhibit "D.")

Mr. Pombo did not state that the repairs could not be done in the Philippine Islands; his statement is merely to the effect that construction of the boiler, cylinder and thrust shaft is not possible, but repairs thereof can be made in the Islands. Again, at the hearing, in answer to the third question propounded to him, he said: "As I say in the certificate, the boiler, the cylinder and the thrust shaft could not be made in the Philippine Islands, although the rest of the work could have been done." In plain language, the only thing impossible to be effected in the Philippine Islands is the construction of the parts enumerated, but as far as the repairs are concerned, it is manifest from the said statement that they could be made in the islands. (See page 2 of the minutes of the hearing held on October 27, 1924.)

Exhibit "B" which is attached to the records of the case and which purports to be a true copy of a letter of the Earnshaws Docks and Honolulu Iron Works, addressed to Mr. Mariano Yengko, acting as Marine surveyor for Ynchausti & Company, under date of February 18, 1924, contains the following: "We are, however, fully equipped with a powerful derrick for removing the

old boiler and locating the new one in its place, and with all the necessary equipment for its installation and all kinds of *necessary repairs*, and should you so desire, we shall be very glad to do the installation." Subsequently, that is, on October 10, 1924, after the return of the S. S. "Venus" from Hongkong already in a repaired condition, the Earnshaws Docks and Honolulu Iron Works, sent a letter to Messrs. Ynchausti & Company stating that "our shops have no adequate facilities to make the H.P. cylinder and thrust shaft with thrust-blocks which were required for the above-named vessel." Nowhere in this subsequent letter does a statement appear that the repairs could not be made in the Philippine Islands. Moreover, at the hearing, Mr. Tomas Earnshaw, testifying in representation of the Earnshaws Docks & Honolulu Iron Works, in reply to the following question: "With the exception of these main parts of the engine, could the other work have been carried out here?" said: "Yes." In other words, he does not deny that part of the work made, presumably the repairs could have been performed in the Philippine Islands. Another witness, Mr. C. B. Nelson, Marine Surveyor, gave his testimony as follows: "Q. From what you have observed, was there any vessel of the size of the S. S. 'Venus' that was reconstructed or generally repaired in the Philippine Islands? A. Not to the same extent as the S. S. 'Venus'." In other words, there have been other ships of the size of the S. S. "Venus" which were repaired, but such repairs were not to the same extent or in the same proportion as those made on the S. S. "Venus." Lastly, Mr. Baxter, the Supervising Inspector of Hulls and Boilers of the Bureau of Customs, who was also required to testify at the hearing, was asked the following question: "Mr. Baxter, from your experience, could you tell whether all the work carried out on the S. S. 'Venus' could have been done in the Philippine Islands?" The answer was: "Not all." What could the expression "not all" mean in this case? It can only mean that part of the repairs could have been done in the Philippine Islands and part of the same elsewhere. As a resume of all the testimony afforded, it is safe to conclude that part of the work in the reconstruction of the S. S. "Venus" could have been successfully made in the Philippine Islands.

That the decision as rendered is manifestly against the provisions of law involved can be readily deduced from a careful perusal of the pertinent provisions of the Tariff Law, as well as the decisions of the Supreme Court in the cases of Fernandez Hermanos vs. Collector of Customs, (30 Phil. 50) and Gutierrez Hermanos vs. Collector of Customs, (39 Phil. 876). The Tariff Act of 1909 provides:

> "Section 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph.
>
> * * * * *
>
> "348. Repairs to vessels documented in the Philippine Islands or regularly plying in the Philippine waters, made in foreign countries, upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands."

The above-quoted provisions of the Philippine Tariff Act had been interpreted in the Fernandez Hermanos case to mean that the repairs are considered a unit in themselves and not severable. In other words, "the repairs referred to in the statute are to be regarded as a whole," in that "repairs made in a foreign port at one time to a single ship cannot be divided into (a) those which could have been made in the Philippine Islands, and (b) those which could not (have been made in this country), and duty levied on that portion which could have been made here." This theory, in plain terms, has been the one followed to the utmost in the decision under request for reconsideration, but it should be borne in mind that in the case of Gutierrez Hermanos vs. the Collector of Customs already referred to, which was promulgated subsequent to the Fernandez Hermanos case, the Supreme Court, speaking through Mr. Justice Malcolm, ruled: "The principles announced in the decision of the Supreme Court in the case of Fernandez Hermanos vs. the Collector of Customs (1915) which appears to have been carried to the utmost limit by this opinion (in the Fernandez Hermanos case) should not be extended so as to include thereunder cases that the law did not contem-

plate." The latter decision which holds the rule contrary to that enunciated in the Fernandez Hermanos case, in that repairs are *divisible*, and which confirms the proposition that the repairs that could have been performed in the Philippine Islands are taxable, states: "If the *parts* and *pieces* necessary for the repair of ships can be obtained in other ports and installed in the Philippine Islands, the protective aims of the Tariff Law are fulfilled. If, however, a shipowner can on the slightest excuse have one small part made in a foreign port in order to have all the repairs made there, then the intent of the Legislature is frustrated." As it has been clearly proven in the arguments supporting the first ground for this request for reconsideration of the decision that part of the repairs made on the S. S. "Venus" could have been performed in the Philippine Islands, it, therefore, follows as a necessary consequence, and in line with the doctrine enunciated in the latter case of Gutierrez Hermanos vs. the Collector of Customs that customs duties should be assessed on those repairs which could be made in the Islands instead of ordering the refund of the whole amount of the duties collected. It is very clear that the decision in the case of Fernandez Hermanos cannot be relied upon as it is repugnant to the decision rendered in the case of Gutierrez Hermanos. Under the rules of statutory construction, the latter doctrine being of recent date, should be held binding upon subsequent similar cases. On the strength of the principles laid down by the Supreme Court in the case of Gutierrez Hermanos, Protest No. 14061 should not have been sustained.

In view of the foregoing, it is earnestly requested that the decision as rendered in Protest No. 14061 of Messrs. Ynchausti & Company, ordering the refund of the whole amount of customs duties collected on entry No. 31654-A, Voucher No. 39138, be reconsidered in order to be consistent with the facts adduced at the hearing as corroborated by the documentary evidence presented, as well as to be in harmony with the jurisprudence reference to which has repeatedly been made.

Respectfully,

(Sgd.) BEN F. WRIGHT,
Insular Auditor.

Certified copy,
(Sgd.) NAZARIO NADURATA.

EXHIBIT "E"

November 7, 1924.

The Honorable,
The Secretary of Finance,
Manila.
Sir:

I have the honor to enclose herewith a copy of our letter to the Insular Collector of Customs, dated November 6, 1924, requesting for reconsideration of the decision rendered on Protest No. 14061, filed by Messrs. Ynchausti & Company, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty on the cost of the repairs made on the S. S. "Venus" at the Port of Hongkong.

In the event that the decision of the Insular Collector of Customs on reconsideration be still adverse to the Government, and if the views of this office as embodied in the letter requesting for reconsideration of the original decision are concurred in by the Honorable, the Secretary of Finance, it is requested that the case be removed to the Court of First Instance in the city of Manila for review, under the provisions of section 1386 of the Administrative Code. The original decision of the Insular Collector of Customs was rendered on October 31, 1924, and under the said section of the Administrative Code, the time within which the case may be removed to the Court for review at the instance of the Secretary is limited to fifteen days after the receipt of a copy of the decision.

Respectfully,
(Sgd.) BEN F. WRIGHT,
Insular Auditor.

EXHIBIT "F"

2nd Indorsement
November 12, 1924

Respectfully forwarded to the Honorable, the Secretary of Finance, inviting attention to the within memorandum of the Superintendent, Marine Railway and Repair Shops, Bureau of Commerce and Industry, which shows that all the repairs made on the S. S. "Venus" at

the Port of Hongkong could have been done by the Earnshaws Docks and Honolulu Iron Works and the Varadero de Manila with the exception only of the manufacture of a new boiler, five winches and thrust shaft, but which can be ordered abroad and installed here in Manila as these docks have facilities to install the said boiler, five winches and thrust shaft. This memorandum gives another reason besides those enumerated in our letter to the Insular Collector of Customs dated November 6, 1924, requesting for reconsideration of the decision rendered on Protest No. 14061, copy of which was sent to that Department under our letter of November 7, 1924, for removing the case to the Court of First Instance in the City of Manila for review under the provisions of section 1386 of the Administrative Code.

The Insular Collector of Customs has not as yet rendered any decision on our request for reconsideration, and since the time within which the Secretary can order the removal of the case to the Court for review will expire on November 14, 1924, it is requested that prompt action on this matter be taken.

There are also inclosed herewith copies of letters that were received by this office from the Atlantic, Gulf and Pacific Company and the Pacific Mail Steamship Company. The first letter shows that the work which the Earnshaws Docks and Honolulu Iron Works claimed that they could not do, namely, the lifting of a boiler weighing approximately 32 tons, could have been done by the Atlantic, Gulf and Pacific Company, and the second letter shows that a boiler weighing 32 tons could have been brought into the Philippine Islands by a vessel of the Pacific Mail Steamship Company.

(Sgd.) BEN F. WRIGHT,
Insular Auditor.

EXHIBIT "G"

November 14, 1924.

The Insular Collector of Customs,
Manila, P. I.

Sir:

In connection with our request of November 6, 1924, for reconsideration of the decision rendered on Protest 14061, I am enclosing you herewith copies of communications which corroborate the correctness of the asser-

tion made in your letter to Messrs. Ynchausti & Company on March 13, 1924, before the S. S. "Venus" was taken to Hongkong, to the effect that in the Philippine Islands there are adequate facilities to carry out the repairs intended to be made and which were in fact made on the S. S. "Venus" at the Port of Hongkong, in view of which those parts of the vessel that could not be manufactured in the Philippine Islands should be imported and installed here in order to permit the Tariff Act to attain its protective aim. Particular attention is called to the memorandum of the Superintendent, Marine Railway and Repair Shop, Bureau of Commerce and Industry, which indicates that the repairs made on the S. S. "Venus" could have been done by the Earnshaws Docks and Honolulu Iron Works and the Varadero de Manila. The letters of Messrs. Smith, Bell & Company, Ltd., and the Pacific Mail Steamship Company state that a boiler weighing 32 tons can be imported into the Philippine Islands from abroad, and the letter of the Atlantic, Gulf & Pacific Company shows that the lifting of a boiler weighing 32 tons, which Mr. Tomas Earnshaw of the Earnshaws Docks and Honolulu Iron Works claimed that their derrick could not have performed, could have been done by the Atlantic, Gulf & Pacific Company.

The interest of the Government demands a careful consideration of the evidence herein presented, which to our point of view is sufficient to overthrow the claim of the protestants, Messrs. Ynchausti & Company, in this case, that adequate facilities to undertake the repairs made on the S. S. "Venus" at the Port of Hongkong do not exist in the Philippine Islands, and therefore, the cost of the repairs should be exempted from the payment of the import duties in accordance with the provisions of the Tariff Act.

Respectfully,
(Sgd.) BEN F. WRIGHT,
Insular Auditor.

EXHIBIT "H"

BUREAU OF AUDITS

Manila, November 28th, 1924.

The Customs Cashier,
Manila.

Your attention is invited to your Warrant No. 210175 returned herewith informing that no action thereon can

be taken by this office until after the request of the Insular Auditor for reconsideration of the decision on Protest No. 14061 is decided upon by the Insular Collector of Customs.

Return of this communication together with the attached vouchers or papers and the note of action taken within the period of 10 days is requested.

(Sgd.) A. HERNANDO,
For the Superintendent, Audits Division,
Department of Insular Audits.

Certified copy:
(Sgd.) NAZARIO NADURATA.

EXHIBIT "I"

BUREAU OF CUSTOMS
MANILA

1st Indorsement
November 26, 1924

Respectfully returned to the Insular Auditor, Manila, with the information that this office finds no justification for reconsidering its decision of October 31, 1924.

(Sgd.) V. ALDANESE,
Insular Collector of Customs.

EXHIBIT "J"

The Government of the Philippine Islands
Bureau of Audits
Manila

December 31, 1924.

The Insular Collector of Customs,
Manila, P. I.

Dear Sir:

I am returning herewith without counter-signature, your Warrant No. 210175, drawn in favor of Ynchausti & Company, for the sum of P159,962.00, being a refund of import duty and customs stamps, entry No. 31654-A, Protest No. 14061.

After a very careful consideration of all of the evidence in connection with this case, I am convinced that your decision to refund to Ynchausti & Company the sum in

question is not justified. It is apparent from the facts submitted that all of the repairs to the S. S. "Venus" could have been satisfactorily effected in Manila, with the exception of the construction of the boiler, the cylinder and the thrust shaft, and that these articles could have been imported to the Islands, and installed in Manila. It is, therefore, obvious, under the decision in the case of Gutierrez Hermanos vs. Collector of Customs, that it was your duty to have assessed and collected a duty upon all of the repairs other than those above specifically mentioned. It is requested, therefore, that the case be again reviewed by you, with the idea in view of assessing and collecting duties as above suggested.

In this connection, this office holds that a decision of the Collector of Customs, such as the one in question, is not final and conclusive upon this office. Section 24 of the Organic Act provides for "the appointment of an Auditor who shall examine, audit, and settle all accounts pertaining to the revenues and receipts, from whatever source, of the Philippine Government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues." The same section also provides that "the administrative jurisdiction of the Auditor over accounts, whether funds or property, and all vouchers and records pertaining thereto, shall be exclusive;" and further, that "the decision of the Auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned, within one year, in the manner hereafter prescribed."

In support of the position taken, that the decision of the Collector of Customs is not binding upon this office, permit me to quote from the decisions of the Comptroller of the United States, Lawrence, 1880, Vol. I, pages 534-548:

> "The usage of the Treasury Department supports the position that the allowance of a claim by the Commissioner could in no case oust the jurisdiction of the accounting officers. (Savings Bank case, ante, 194; Bender's case, ante, 339.) Such allowance, as said by Hon. F. French, Assistant Secretary of the Treasury, is "a mere step in the system of internal revenue laws," and "the decision of the Commissioner of Internal Revenue is not made final or con-

clusive by any statute; but it was clearly within the province of the Comptroller in this case to decide whether the opinion of the Commissioner of Internal Revenue was not correct both in law and fact." (House Ex. Doc. No. 27, 2d sess. 45th Cong., p. 43.)

* * * * *

"A claim for the refunding of internal-revenue tax is a claim or demand against the United States. Section 236 of the Revised Statutes provides that—

> " 'All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.'

"The Auditors and Comptrollers, and they only, are charged with the duty of executing the provisions of this section. (Rev. Stats., Title VII, Chaps. 3, 4.) Their action on claims and accounts is exclusive of that of any other executive officers, and is conclusive upon the executive branch of the Government. (Rev. Stats., 191.) These officers must, therefore, act upon an internal-revenue of refunding claim; first, because it is a demand against the United States; and, second, because the mode of payment involves the statement of an account and the certification of a balance due."

* * * * *

"The statutes require the Auditor and Comptroller to examine claims. The Comptroller then certifies the balance, if any, found due; and his certificate is made 'conclusive upon the executive branch of the Government.' (Rev. Stats., 191.) It is thus conclusive upon the President, and upon the heads of Departments, and hence also upon the Commissioner of Internal Revenue. The Statute employes very explicit language to secure this conclusive effect. If this action is conclusive on all these officers, no action of theirs can be conclusive on the Auditor and Comptroller, unless it is made so by an equally explicit statute, and there is none such in respect to internal-revenue refunding claims."

"The jurisdiction exercised by the Auditor and the Comptroller over the adjustment of the claims is a discretionary character.

"Such being its character, the action of the Commissioner of Internal Revenue is not binding upon them."

* * * * *

"An account must be stated, examined, and certified by the accounting officers for the payment of every claim which is settled in the Treasury Department. The action required of accounting officers in the settlement and adjustment of claims and accounts is, as has already been shown by the statutes and decisions of the courts, and more particularly in Watkins vs. the United States, discretionary in the highest degree. They are presumed to state the account according to the law and the facts in each case; to admit credits which, in their judgment, are correct, and to reject all credits and claims which, in their opinion, are illegal or not supported by satisfactory evidence as to the facts alleged by the claimant or debtor."

Again in the decision of the United States Comptroller, Volume VI, page 263, the following ruling of the Court of Claims is cited:

"In the case of Dugan v. United States decided by the Court of Claims June 5, 1899, the question of the conclusiveness of an allowance by the Commissioner of Internal Revenue for a refund of a tax erroneously collected was again considered. In this case the court said:

" 'There is no contention that the allowance or awards thus made were procured by fraud, or that any mistakes in mathematical calculations exist. On the contrary, the Government's counsel insists that the decision of the Commissioner is conclusive, and therefore not open to review by either the accounting officers of the Treasury Department or the courts.

" 'The question is, therefore, had the Commissioner authority and power under the statute quoted to make the allowance or awards referred to?

" 'His decision in respect to disputed question of fact, in the absence of fraud or mistakes in

mathematical calculation, would certainly be final and not open to review, but in the absence of disputed questions of fact, where his decision involves the construction of the law under which he acts, we think a different rule applies.' "

It will be noted that the above opinions of the Comptroller relate to the Commissioner of Internal Revenue of the United States; however, as far as I am aware, the opinions quoted apply with equal force to the decisions of the Collector of Customs.

In taking this position, I desire to state that it is neither the intention or the desire of this office to question the authority of the Insular Collector of Customs, as defined in the Administrative Code or other laws, insofar as such laws are not in conflict with the Organic Act, which makes it the duty of the Insular Auditor to examine, audit, and settle all accounts pertaining to the revenues and receipts of funds, from whatever source, of the Insular Government.

The mere fact that the Administrative Code prescribes certain duties for the Insular Collector of Customs, and demands of him the interpretation and application of the laws, can in no way affect the jurisdiction of the Insular Auditor in the settlement of any claim or account before him. The very words of the law defining the powers of the Insular Auditor, which provide that his decisions shall be final and conclusive upon the executive branches of the Government, and that in the exercise of his duties, he is authorized to make investigations and to require the submission of any papers, documents and records, would certainly demand of him the questioning of any interpretation that might be placed upon the laws relating to the revenues or expenditures of the Government.

Respectfully yours,

(Sgd.) BEN F. WRIGHT,
Insular Auditor.

A certified true copy.
(Sgd.) NAZARIO NADURATA.

EXHIBIT "K"

THE GOVERNMENT OF THE PHILIPPINE ISLANDS
DEPARTMENT OF FINANCE
BUREAU OF CUSTOMS
MANILA

March 20, 1920.

Special Order No. 88.

Appointing officials of the Bureau of Customs to serve in the Board of Protests and Appeals.

Paragraph I. The following officials of the Bureau of Customs will hereafter compose the Board of Protests and Appeals:

The Insular Deputy Collector of Customs, Chairman.

The Special Agent, Administrative Division Member.

The Chief of the Marine Division, Member.

The Secretary, Board of Protests and Appeals, Member.

Par. II. In case of absence of any of the above named officers, the person serving for the time in his place and stead shall serve as a member or chairman, as the case may be, of said Board.

Par. III. All previous orders and circulars in conflict herewith are hereby revoked.

V. ALDANESE,
Insular Collector of Customs.

Certified Copy:
(Sgd.) NAZARIO NADURATA.

EXHIBIT "L"

104 Dasmarinas,
Manila.

Octubre 9, 1924.

Sres. Ynchausti & Co.,
Manila.

Muy senores mio:

Tengo el honor de acusar a Vds. recibo de su carta fecha de hoy en la que me preguntan las posibilidades de efectuar en Manila la construccion de una caldera con

cilindro y un eje de empuje para la maquina del Vapor "Venus."

Contestando a dicha pregunta puedo asegurarles que por hoy es imposible efectuar en Filipinas las citadas obras; pues los talleres existentes son completos para reparaciones de cascos, maquinas, ejes y calderas, pero por ningun concepto para la construccion de dichos organos, por carecer de elementos para estos trabajos.

Esperando nuevamente sus ordenes, es de Vds.

Atentamente,

(Sgd.) CARLOS POMBO.

Certified Copy:
(Sgd.) NAZARIO NADURATA.

EXHIBIT "M"

THE EARNSHAWS DOCKS & HONOLULU IRON WORKS

Incorporated 1912

Manila, Feb. 18, 1924.

Mr. Mariano Yenko,
Marine Inspector for
Ynchausti & Co.,
Manila.

Dear Sirs:

We are in receipt of your favor of the 12th inst., referring to the replacing of the old boiler of the S. S. "VENUS" with a new one.

We hereby certify that we are unable to construct a complete new boiler for the above vessel due to lack of proper facilities at our shops.

We are, however, fully equipped with a powerful derrick for removing the old boiler and locating the new one in its place and with all the necessary equipment for its installation and all kinds of necessary repairs, and should you desire, we shall be very glad to do this installation.

Yours very truly,
THE EARNSHAWS DOCKS & HONOLULU IRON WORKS,
By (Sgd.) T. EARNSHAW,
Manager, Marine Plant.

Certified true copy.
(Sgd.) NAZARIO NADURATA.

EXHIBIT "N"

THE EARNSHAWS DOCKS & HONOLULU IRON WORKS

Incorporated 1912.

Manila, P. I., Oct. 10, 1924.

Messrs. Ynchausti & Co.,
Manila.
Dear Sirs:

We beg to acknowledge receipt of your favor of the 8th inst., with reference to the reconstruction of the S. S. VENUS.

We hereby certify that our shops have no adequate facilities to make the H. P. cylinder and the thrust shaft with thrust-blocks which were required for the above named vessel.

With reference to our letter dated February 18, 1924, wherein we mentioned that we were equipped with a derrick for removing the old boiler and locating the new one in its place, we were under the belief that the new boiler could not weigh more than 25 tons and for this reason we stated that we could have done its installation.

With reference to the last paragraph in your letter regarding stability tests, these tests can be performed by us whenever necessary.

Yours very truly,
THE EARNSHAWS DOCKS & HONOLULU IRON WORKS,
By (Sgd.) T. EARNSHAW,
Manager, Marine Plant.

Certified true copy.
(Sgd.) NAZARIO NADURATA.

On March 9, the petitioner filed his reply memorandum.

On March 21, 1925, the Supreme Court issued the following resolution:

> "In view of the importance of the questions involved and the desirability of having them passed upon by a full court, it is ordered that case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., be again included in the July calendar for reargument."

On July 17, 1925, the petitioner filed the following petition:

(CAPTION AND TITLE OMITTED)

Now comes the petitioner in the above entitled cause, by its undersigned attorneys, and respectfully prays this Honorable Court, in consideration of the importance of the issues involved herein, to allow petitioner one hour and a half for oral argument. The hearing has been set for the 27th instant.

Manila, P. I., July 17, 1925.

Respectfully submitted,

FISHER, DEWITT, PERKINS & BRADY

By (Sgd.) F. C. FISHER

Attorneys for Petitioner.

On September 21, 1925, the Supreme Court rendered the following decision:

(CAPTION AND TITLE OMITTED)

DECISION

JOHNS, J.:

STATEMENT

After the formal allegations, the petitioner alleges that it is the agent and operator of the steamship VENUS which is used in the coastwise trade of the Philippine Islands. That between February 12 and September 16, 1924, and because there were no adequate facilities in the Philippine Islands, it caused certain heavy repairs and reconstruction work to be done in Hongkong at a cost of $300,004.90, Hongkong Currency. That upon the return of the steamer to the Philippine Waters, about October 20, 1924, the Insular Collector of Customs of Ma-

nila levied the customs duty payable on such repairs and reconstruction work at P159,960.00, and made a demand for its payment. That on October 24, 1924, the petitioner paid the money under protest, claiming that such repairs and work were exempt from the payment of customs duty under Paragraph 200, Section 8, and Paragraph 348, Section 11, of the Philippine Tariff Act of 1909. That on October 31, 1924, and after an official hearing by him, the Insular Collector of Customs rendered a decision sustaining the protest, and ordered the refund of the money. That copies of the decision were immediately transmitted to the Secretary of Finance and to the defendant Auditor. It is then alleged that the Secretary of Finance failed, within fifteen days, to certify that in his opinion, the decision ought to be revised by the Court of First Instance of the City of Manila, or to order its removal, by reason of which the decision of the Collector of Customs has become and is now final and conclusive upon the Government of the Philippine Islands, as provided in Section 1383 of the Administrative Code. That on November 6, 1924, the respondent, without any authority, addressed a letter to the Insular Collector of Customs asking him to reconsider his decision, and the Insular Collector of Customs denied the request, and affirmed his decision of October thirty-first. That on November 26, 1924, the Insular Collector of Customs drew and signed a warrant for the refund of the import duty, and that the defendant wrongfully and unlawfully refused to do so, and still refuses to countersign the warrant. That the petitioner has no plain, speedy and adequate remedy at law, and it prays for a peremptory writ of mandamus directed to the defendant to countersign the warrant.

For answer, the defendant admits the allegations made in paragraphs 1, 2, 3, 4, 6, and 8 of the petition, and denies all and singular allegations contained in paragraphs 5, 7, 9, 10, 11 and 12, with the exception of those which

in his further defense may be expressly admitted, and, as a special plea, alleges that the steamship VENUS, owned and operated by the petitioner, is a steam vessel, whose tonnage, gross and net, at the time of the repairs, were 987.64 and 597.74, respectively. That prior to February, 1924, the steamship needed certain repairs. That notwithstanding the existence and availability of adequate facilities in the Philippines, the petitioner caused the repairs to be made in Hongkong. That upon the arrival of the steamer, the Insular Collector of Customs of Manila made the assessment in question, which was paid under protest. That on October 31, 1924, the Insular Collector of Customs sustained the petitioner's protest, and ordered the refund of the money, and that on the same day the defendant received a copy of the decision. That, notwithstanding the protest of the petitioner, the money in question, upon being paid to, and received by, the Collector of Customs, was covered into the Insular Treasury of the Philippine Government, and became a part of the general unappropriated funds, in accord with Section 14, Chapter III, of Act No. 2935. It is then alleged "that to meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 1515." "That the duty and responsibility to examine, audit, settle and revise all accounts and claims for refund of customs duties rest solely and exclusively with the respondent Insular Auditor." That at once, upon the receipt of the decision of the Collector of Customs, the defendant, pursuant to the powers and duties invested in him by law, caused inquiries and investigations to be made, to ascertain and verify the correctness and veracity of the claim that the repairs could not have been made in the Philippine Islands, for the purpose of determining whether the refund by the Collector of Customs, or the payment for which credit is claimed was actually to be made for ob-

jects or purposes authorized by Act. No. 357, as amended by Act No. 1515. That on or about November sixth, the defendant, being convinced that adequate facilities for the repairs were afforded, and conscious of the duties and responsibilities invested in him by the Jones Law, wrote a letter to the Insular Collector of Customs, requesting a reconsideration of his decision on the protest, on the ground that it was openly and manifestly contrary to the weight of the evidence in this case, and to the provisions of Paragraph 200, Section 8, and Paragraph 348, Section 11, of the Philippine Tariff Act of 1909. That on November seventh, the defendant wrote the Secretary of Finance furnishing him with a copy of the letter to the Collector of Customs, and requested the Secretary of Finance to have the decision of the Collector of Customs reviewed by the Court of First Instance of the City of Manila, in the event that the Collector refused to reconsider his decision. That on November twelfth the defendant, having obtained additional evidence, as a result of his investigation and inquiry, reiterated to the Secretary of Finance his request to have the cause removed to the court for review, reminding him that the period within which the removal should be made would expire on November 14, 1924. That on November 14, 1924, the defendant addressed another letter to the Collector of Customs furnishing him with additional written proof, and again requesting him to review his decision. That his letters to the Secretary of Finance of November seventh and twelfth and to the Collector of Customs of November sixth and fourteenth were never answered. That on November 26, 1924, the Collector of Customs presented to the defendant, for counter-signature, the warrant in question in favor of the petitioner for the payment of the claim which was styled for the payment of petitioner's claim for the refund of the import duty, entry No. 316654-A, Protest No. 14061. That on November 28th, the defendant returned the warrant,

and informed the Collector of Customs that no action could be taken until after the request of the respondent for a reconsideration of the decision had been passed upon by him. That on the same day, the Insular Collector of Customs returned defendant's request for a reconsideration, "stating that he finds no justification for reconsidering his decision of October 31st, 1924, on said Protest No. 14061." That the time the petition was filed in this Court, the defendant had not yet finally decided whether he would approve or countersign the warrant.

As a further and separate defense, it is alleged that this Court has no jurisdiction of the subject-matter, and that the petitioner has another plain, speedy and adequate remedy in the ordinary course of law.

As a part of his answer, the defendant attached to the record a transcript of all the evidence taken by the Collector of Customs at the hearing on the protest and his decision upon such hearing, together with a copy of all the correspondence between the defendant and the Collector of Customs and the Secretary of Finance, and the defendant prays that the suit be dismissed.

To this answer, the petitioner filed a general demurrer upon the ground that it does not state facts sufficient to constitute a defense, and that is the question now before this Court.

JOHNS, J.:

By the pleadings, the following facts are admitted:

First. That at the times alleged the plaintiff was the owner of the steamship VENUS. That it was taken to Hongkong, and that repairs and overhauling charges were made upon the boilers and thrust shaft, which, in round numbers, cost $300,000.00 in Hongkong money;

Second. That on the return of the vessel to Manila, the owners were forced to, and did, pay P159,960.00 as a condition precedent to the docking of the vessel in Philippine waters;

Third. That the money was paid under a duly written protest and upon which the petitioner legally demanded a hearing. That a hearing was duly had upon which evidence was taken, based upon which the Collector of Customs rendered a decision sustaining the protest, and ordering a refund of the money, and that such decision has become and is now final; and

Fourth. That based upon, and in accord with, the decision the warrant in question was drawn and signed by the Collector of Customs and forwarded to the defendant for his signature, who then and ever since has refused to sign it.

Upon such admitted facts, the petitioner contends that the signing of the warrant is a matter over which the Auditor has no discretion, and that his duties are ministerial only.

The defendant contends that he is not legally bound by the decision of the Collector of Customs, and that the signing of the warrant is a matter in his discretion. That this court has no jurisdiction of the subject-matter; and that the petitioner has a plain, speedy and adequate remedy at law. That the money has been paid over to the Government Treasury, and that for such reasons mandamus will not lie.

The decision of the Collector of Customs is as follows:

"Protest No. 14061.

"DECISION.

"This protest is against the assessment of duty on cost of repairs made at Hongkong to the steamship 'Venus' of Ynchausti & Co., Manila, under paragraph 200 of the Philippine Tariff Act of 1909 at fifty per centum ad valorem instead of exempting the same from duty by virtue of the provisions of paragraph 200 and 348 of the said Tariff Act.

"The only question to be considered in this case is whether the repairs are entitled to free duty or not, or whether adequate facilities exist in the Philippine Islands

for carrying out such repairs or not. In order to give the protestants an opportunity to prove their claim, a hearing was held on October 27, 1924, and the following evidence was produced:

"A letter of Fernandez Hermanos to Mariano Yenko, Marine Surveyor, acting as Marine Superintendent for Ynchausti & Co., dated March 8, 1924, in which the former state that they cannot construct a boiler for the S. S. 'Venus' (Exhibit 'A').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Mariano Yenko dated February 18, 1924, stating that they are unable to construct a new, complete boiler, but that they have a powerful derrick to remove the old one and place a new one (Exhibit 'B').

"A letter of the Earnshaws Dock and Honolulu Iron Works to Ynchausti & Co., dated September 25, 1924, informing the latter that the maximum lifting capacity of their floating derrick is 25 tons (Exhibit 'C').

"A letter of Carlos Pombo to Ynchausti & Co., dated October 9, 1924, advising that it is impossible to construct a boiler with cylinder and a thrust shaft for the 'Venus' in the Philippines (Exhibit 'D').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated October 10, 1924, certifying that their shops have no adequate facilities to make H. P. cylinder and thrust shaft with thrust blocks for S. S. 'Venus.' They also correct the statement contained in their letter of February 18, 1924, Exhibit 'B,' to the effect that they have found out that the 'Venus' boiler is too heavy for their derrick (Exhibit 'E').

"A certificate of the Hongkong & Whampoa Dock Co., Ltd., stating the weights of the component parts of the boiler built by the same for the 'Venus' (Exhibit 'F').

"A letter of C. B. Nelson, Marine Surveyor, to Ynchausti & Co., dated October 15, 1924, stating that no vessel of the size of the S. S. 'Venus' has been reconstructed at this port and has 'such extensive repairs carried out,' and that the main boiler and thrust shaft could not be made at Manila (Exhibit 'G').

"The statements contained in the above letters and certificates have been confirmed by the parties subscribing the same, at the hearing, and have been corroborated by the Chief of Hull and Boiler Division of this Bureau. The lack of adequate facilities is, therefore, clearly established and the undersigned is convinced that the repairs to and reconstruction of the Steamship 'Venus' could not be effected in the Philippine Islands.

"This case is identical with that of Fernandez Hermanos vs. the Insular Collector of Customs (R. G. No. 8667, Vol. 30, page 50, of the Philippine Reports) and the decision thereon applies hereto.

"Protest No. 14061 is, therefore, for the foregoing reasons, sustained and a refund of the customs duty collected is ordered to the protestants.

(Sgd.) "V. ALDANESE,
"Insular Collector of Customs."

The decision of Fernandez Hermanos vs. Collector of Customs above cited was rendered on March 6, 1915, and was based on the following statute:

> "Sec. 8. That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said Islands from the United States or any of its possessions except as otherwise provided in this Act shall be as follows:
>
> * * * * *
>
> "200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem.
>
> "*Provided*, That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act:
>
> "Sec. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which

shall be prescribed in accord with the provisions of each paragraph:

* * * * *

"348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the Collector of Customs that adequate facilities for such repairs are not afforded in the Philippine Islands." (Tariff Act.)

It was there held that:

"(1) Facilities are not adequate unless, when required, all of the repairs necessary for the safe, convenient and economical operation of the ship can be made by the use of such facilities. (2) If all of the repairs necessary for the safe, convenient and economical operation of the ship cannot be made in the Philippine Islands, then, if made in a foreign port, they may come into the Philippine Islands free of duty. (3) The repairs referred to in the statute are to be regarded as a whole; and the repairs made in a foreign port at one time to a single ship cannot be divided into (a) those which could have been made in the Philippine Islands and (b) those which could not, and duty, levied on that portion which could have been made here."

This decision was followed by Gutierrez Hermanos *vs.* Collector of Customs, 39 Phil., 876, in which this Court, among other things, said:

"Another phase of the Fernandez Hermanos case indicative of a difference between the facts in that case and those before us concerns the weight which the courts should give to the findings of the Insular Collector of Customs. The next to the last paragraph of the Fernandez Hermanos decision reads:

" 'The question of the control of the discretion of the Collector of Customs under the tariff law in determining whether or not there are adequate facilities in the Philippine Islands for the repair of a given ship is not involved in this case, inasmuch as it is admitted and the Collector has found that there

were not adequate facilities in the Philippine Islands for the repair of the ship involved in the case, he declaring that some of the most important repairs could not be made here at all.'

"The next to the last paragraph of the decision of the Insular Collector of Customs in the case before us reads:

" 'This Office is therefore of the opinion and so decides, that there were adequate facilities in the Philippine Islands for doing all of the repair job in question to the steamship *Magellanes* and that all the repairs done upon said vessels in Hongkong cannot be admitted duty free merely upon the showing that a single piece or part, used in making such repairs, could not be manufactured in the Philippine Islands, in the absence of a showing to the effect that reasonable diligence had been used to obtain the part required.'

"In the first case, therefore, the ruling of the Insular Collector of Customs and such as not to involve any reference to the home facilities for repairs, while in the second case he has made an express finding to the effect that upon proof satisfactory to him adequate facilities for the repairs are afforded in the Philippine Islands. In line with the repeated decisions of the courts, the confidence which the law imposes in the judgment of the Collector of Customs should not be unduly interfered with by the courts and the same shall be taken as *prima facie* controlling unless there is clear proof of abuse of discretion. Abuse of discretion by the Insular Collector of Customs is not established."

After the latter decision was rendered, the Philippine Legislature, under the authority conferred by Section 10 of the Jones Law, enacted Act No. 2872, approved November 24, 1919, amending the above quoted provisions of Paragraph 200, Section 8, of the Tariff Law of 1909, to read as follows:

"SECTION 1. Paragraph two hundred of section eight of the Act of Congress of the United States of August fifth, nineteen hundred and nine, entitled 'An Act to raise revenue for the Philippine

Islands, and for other purposes,' is hereby amended to read as follows:

"GROUP 4.—Boats and other water craft.

"200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorem on and after January first, nineteen hundred and twenty-five.

"*Provided,* That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably, economically and within reasonable time, in the judgment of said collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

The purpose and intent of the amendment is very apparent. It leaves the whole question to the discretion of the Collector of Customs as to whether or not the work and repairs on a vessel can be done in the Philippine Islands "reasonably economically and within a reasonable time." This act, as amended, was put into legal force and effect by a proclamation of date December 11, 1919.

Among other things, the Administrative Code provides:

"Sec. 1384. *By whom cause may be removed into court.*—The removal of a cause into court may be had at the instance of the protesting party or, in case of seizure, at the instance of the owner or agent of the seized property. If the decision of the Insular Collector is adverse to the Government the cause may also be removed in the manner hereinafter specified, by order of the Department Head.

"Sec. 1386. *Removal upon order of Department Head.*—Upon making any decision which may be removed upon the order of the Department Head,

the Insular Collector shall immediately transmit a copy of such decision to him and also the Insular Auditor; and if within fifteen days thereafter the Department Head shall certify that in his opinion the decision ought to be revised by the Court of First Instance in the city of Manila, it shall be the duty of the Insular Collector, upon notification thereof, to transmit the original record to said court in the same manner as upon removal by a party other than the Government.

"Sec. 1383. *Review in Court of First Instance.*— The party aggrieved by the decision of the Insular Collector in any matter brought before him upon protest or by his action or decision in any case of seizure may procure the cause to be removed for review into the Court of First Instance sitting in the city of Manila, in the manner and within the period hereinafter prescribed.

"Unless the property party in interest shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him."

No appeal was ever taken from the above quoted decision of the Insular Collector of Customs, and, as such, it has become and is now final, although it is but fair to say that the defendant requested a reconsideration of the decision, and sought to have an appeal taken from it to the Court of First Instance, which was not done.

Conceding that all of such facts are true, the defendant contends that, notwithstanding such express provisions of the statute, under the terms and provisions of the Jones Law, and as Insular Auditor, he yet has supervision and a discretionary power over such matters, and to that extent and in that particular, the provisions of the Jones Law are superior to, and should prevail over, the provisions of Act. No. 2872.

Section 24 of the Jones Law provides that the Insular Auditor shall:

"a) '* * * examine, audit and settle all accounts pertaining to the revenue * * * of the Philippine Government. * * *;' and

"b) '* * * audit in accordance with law and administrative regulations, all expenditures of funds * * * pertaining to * * * the Government.'"

By the language of the act, the defendant is authorized to "audit, examine and settle accounts." As to the "expenditures of funds pertaining to the Government," he is authorized to "audit in accordance with law and administrative regulations."

It will be noted that the words "examine" and "settle," which are included in, and made a part of, paragraph (a) are omitted in paragraph (b). This is significant.

In the case of Powers *vs.* United States, 18 Court of Claims, 275, it is said:

"An account is something which must be adjusted and liquidated by arithmetical process."

Words and Phrases, Volume 1, page 87, says:

"An account is a list of statement of monetary transactions, such as payments, losses, sales, debits, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, e. g., receipts and payments.

"An 'account' is a detailed statement of items of debit and credit, or of debt arising out of contracts between parties.

"A computation or statement of debts and credits arising out of personal property bought or sold, services rendered, material furnished, and the use of property hired and returned.

"An account is defined to be a detailed statement of mutual demands in the matter of debt and credit between parties, arising out of contracts or some fiduciary relation."

Page 89:

"The word 'account' is a word of wide and varied signification. An account in its most general mean-

ing is a reckoning or a statement of items or details. It is not necessary that there should be * * * items on both sides, for there may be a long account of sales of merchandise, or of materials furnished, embracing only the items of the merchandise delivered or of the work done.

"The term 'account' involves the idea of debit and credit. The particular mode of keeping the account, whether on books or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms, is unimportant."

Page 90:

The stating of a single demand, the amount and validity of which has become unalterably fixed, is not an account within the meaning of Comp. St. 1897, c. 18, sec. 23, requiring the board of county commissioners to examine and settle all "accounts."

In the instant case, there was only one item which grew out of one transaction, and the only question involved was the legality of the claim. Hence, petitioner's claim was not an account within the definition of the word.

In Words and Phrases, Volume 1, page 639, it is said:

"The word 'audit' means to examine and adjust."

Page 640:

"To audit is to examine an account, compare it with the vouchers, adjust the same, and to state the balance, by persons legally authorized for the purpose.

"To audit an account is to examine and digest it, or examine and verify it, or examine and adjust it. In actual practice to audit an account is to see that the accountant is charged with everything with which he is justly chargeable, and that nothing is placed on the credit side of the account for which he is not justly entitled to credit; and then, after the

debit and credit are thus made up, to ascertain the balance remaining in his hands. In re Heath's Estate, 33 Atl. 46, 47, 52 N. J. Eq. (7 Dick.) 807."

The language in paragraph (b), to "audit in accordance with law and administrative regulations" means what it says. In other words, the "audit" should be made as the law and the administrative regulations provide. That is to say, where the law itself has made the "audit," or the administrative regulations have made the "audit," the "audit" so made should be followed and approved.

Applying that rule in the instant case, the duties of the Insular Auditor were confined and limited to—

"1. Ascertain that the protested claim has in fact been made;
2. That the protest was made within due time;
3. That no appeal has been taken from the decision and that it is, therefore, final;
4. That the amount for which the warrant is drawn corresponds to the amount paid under protest;
5. That there is money available in the treasury with which to meet the payment;
6. That the claim is one for refund of duties on repairs made abroad."

Again, the original statute, requiring proof satisfactory to the Collector of Customs that adequate facilities for repairs to vessels are not afforded in the Philippine Islands, is found in the Philippine Tariff Law of 1909, and in accord with the repeated decisions of this Court, the provision in question was included in, and is a part of, the organic law of the Philippine Islands. The subsequent amendatory law, Act No. 2872 of the Philippine Legislature was enacted by the Legislature November 24, 1919, pursuant to the authority granted it by Section 10 of the Jones Law, three years after the Jones Law was enacted. This amendatory act, since it related

to the tariff, required the approval of the President of the United States, and was given such approval by Proclamation dated December 11, 1919. The provisions of the Administrative Code of 1917, containing provisions of the Administrative Code of 1916, which the Jones Law continued in force and effect, were approved by the President on October 1, 1917. Hence, it must follow that all of the legal provisions relating to the power of the Collector of Customs are found either in laws having their origin in organic law, or which partake of the nature of organic law.

The provisions of law which confer specific powers on the Insular Auditor are found either in the Jones Law, the Act of Congress of August 29, 1916, or in the Administrative Code. As just noted, these late provisions were approved by the President. So that, as to this particular transaction, the power of the Collector of Customs, like the power of the Insular Auditor, is grounded in the organic law of the Philippines.

The case of Concepcion *vs.* Paredes, 42 Phil., 599, was decided by this Court on December 23, 1921, and it was there held:

> "1. CONSTITUTIONAL LAW; GOVERNMENT OF THE PHILIPPINE ISLANDS; THE PHILIPPINE CONSTITUTION.—The various Acts of the Congress of the United States which have been formally and expressly extended to the Philippines, especially the Act of Congress of August 29, 1916, and the Acts of the Philippine Commission and Legislature which United States Statutes have changed to organic laws, constitute the major portion of the so-called Constitution of the Philippine Islands.
>
> "2. ID.; ID.; ID.—It is beyond the power of any branch of the Government of the Philippine Islands to exercise its function in any other way than that prescribed by the organic law or by local laws which conform to the organic law.
>
> "3. ID.; ID.; ID.; POWER OF PHILIPPINE LEGISLATURE.—An Act of the Philippine Leg-

islature which has not been expressly disapproved by Congress is valid unless the subject-matter has been covered by Congressional legislation, or its enactment forbidden by some provision of the organic law. The Philippine Legislature is granted by the Organic Act, the Act of Congress of August 29, 1916, general legislative power subject to specific restrictions."

The opinion in that case was signed and approved by six members of this Court, and one member concurred in the result only, and two others reserved their votes.

What is known as the Philippine Tariff Act of 1909 is an Act of Congress, and as to the matters therein contained, it has the same legal force and effect as the Jones Law itself. The amendment to that act which was made by the Legislature of the Philippine Islands in 1919, was made in the manner and form provided by the Jones Law, and was approved by the President of the United States, and hence it is now a valid law. It follows that the law as to vessels and water crafts should not be confined or limited to the Jones Law, but should include the original Philippine Tariff Act of 1909, and the amendment to it of 1919, and the provisions of the Administrative Code above quoted. For such reasons, all of such acts should be combined and construed as one as to the law of vessels and water crafts on all questions relating to the Philippine Tariff Act.

In other words, the duties of the Insular Auditor were confined and limited to an investigation of the primary and fundamental facts as to whether a protest was duly filed and a hearing was duly had upon the protest, and that the Collector of Customs had ordered the refund of the money in question and whether there had been a compliance with all of the legal formalities concerning the protest.

By an examination of the pleadings, it will be found that all of such questions are admitted by the defendant in his answer.

In Hoey *vs.* Baldwin, 1 Phil., 551, the complaint alleged that proper certificates showing that the petitioner was entitled to receive his salary had been filed with the defendant. It was there held that:

> "The only duty which the defendant had to perform in this case was to pay the money to the plaintiff. This was a duty purely ministerial, 'which the law specially enjoins as a duty resulting from' his office."

The defendant cites and relies on the case of Lamb *vs.* Phipps, 22 Phil., 456. But that case was one in which the Auditor was clearly authorized and empowered to exercise discretionary and quasi-judicial power. It involved an examination and settlement of an account, the balancing of items of debit and credit to ascertain if a balance was or was not due from Lamb to the Government, and no other Government official was empowered to settle and decide those questions.

There is a marked difference between that and the instant case on both the law and the facts. But the case of Lamb *vs.* Phipps holds:

> "Auditors and comptrollers, as accounting officers, are generally regarded as quasi-judicial officers. They perform mere *ministerial duties only in cases where the sum due is conclusively fixed by law or pursuant to law. Except in such cases, the action of the accounting officers upon claims* * * * *is not ministerial* merely but judicial and discretionary."

On principle, the case of Zobel *vs.* The City of Manila, XXIII O. G., 411, is in point. There the Court held:

> "Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first instalment of the purchase price; and it is insisted

for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Government must be considered to be qualified as regards the contract rights of persons dealing with the city by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor should possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

The defendant vigorously contends that mandamus will not lie. As stated, petitioner's protest was sustained by the Collector of Customs, who rendered a decision ordering the refund of the money, and that decision is now final.

In the case of Compania Gral. de Tabacos *vs.* French and Unson, 39 Phil., 34, the opinion, on page 58, says:

"The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts.

"In considering the case before us, it is important to bear in mind that the Government is admittedly indebted to the petitioner in the definite and certain sum of P322.93. No action, either administrative or judicial, is therefore necessary to fix this liability upon the Government. In so far as legal liability can result from governmental activities, liability exists and upon the demurrer is admitted. Furthermore, said liability is such that it should be absolved by a warrant drawn by the Purchasing Agent and countersigned by the Insular Auditor. The law makes provision for the payment of the money in this way, and it cannot otherwise be gotten out of the Insular Treasury.

"The legal remedy here indicated as proper is the writ of mandamus to compel the Purchasing Agent and the Insular Auditor to issue, countersign, and deliver the proper warrant to the petitioner. (Hoey *vs.* Baldwin, 1 Phil. Rep., 551.)

"The liability of these officers to the coercive process of mandamus arises from the fact that a valid claim exists for the payment of which provision has been made, that these officers are the appointed agents for making the payment, and that under these circumstances the execution and delivery to the creditor of the warrant are merely *ministerial* functions involving no discretionary action whatever."

On legal principle, the case of Work v. United States on the Relation of McAlester-Edwards Coal Company decided by the Supreme Court of the United States on May 21, 1923, and reported in 67 Law ed., 949, is squarely in point. The opinion was written by Chief Justice Taft, and it is there said:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. See also Work v. United States, decided March 19, 1923 (261 U. S. 352, ante, 693, 43 Sup. Ct. Rep. 389)."

Upon the admitted facts, the law fixed the liability, and defendant's duties in the countersigning of the warrant are purely ministerial.

It is argued with much force that the petitioner has a complete, speedy and adequate remedy at law in an ap-

peal from the action of the Insular Auditor to the Governor-General under the provisions of sections 653 and 656 of the Administrative Code.

That question was squarely met and decided by this Court in the case of Compania Gral. de Tabacos *vs.* French, et al., *supra*, where it was held:

> "It results that the proceedings under sections 653 to 656, inclusive of the Administrative Code (1917), are at no stage binding upon the courts, whether an administrative appeal is taken or not. The circumstance that no appeal to the Governor-General was taken by the petitioner in the instant case is, therefore, immaterial so far as the judicial solution of the controversy is concerned.
>
> "The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts."

Although that opinion was written by Justice Fisher who was then a member of this Court, and who is now counsel for the petitioner, it is worthy of note that it was unqualifiedly signed by every member of the court. That decision was rendered November 8, 1918, has never been overruled, has become and is now *stare decisis*.

Words and Phrases, Volume 1, page 182, says:

> "The term 'adequate remedy at law' means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Keplinger v. Woolsey (Neb.), 93 N. W. 1008, 1009.
>
> "The rule that equity will not grant extraordinary relief, as specific performance, mandamus, and the like, where there is an 'adequate remedy at law,' means a specific, adequate legal remedy competent to afford relief on the very subject-matter made the foundation of the prayer for equitable relief. An applicant for mandamus to require a public officer to perform a duty imposed on him by law has not an 'adequate remedy at law,' unless such legal remedy will require the officer to perform in effect the specific act which the law requires him to do. Babcock v. Goodrich, 47 Cal. 488, 508.

"An 'adequate remedy' which will prevent the issue of a writ of certiorari is a remedy which is equally beneficial, speedy, and sufficient; not merely a remedy which at some time in the future will bring a revival of the judgment of the lower court complained of in the certiorari proceedings, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal. State v. Guinotte, 57 S. W. 281, 286, 156 Mo. 513, 50 L. R. A. 787."

The defendant forcibly contends that in the instant case his powers and duties are specified and defined under the following provisions of the Jones Law:

"The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive.

"The decision of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed.

"In the execution of their duties the auditor and the deputy auditor are authorized to summon witnesses, administer oaths, and to take evidence, and in the pursuance of these provisions, may issue subpoenas and enforce the attendance of witnesses, as now provided by law." (Sec. 24, Philippine Autonomy Act.)

"That any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authorities relied on for reversing such decision." (Sec. 25, Philippine Autonomy Act.)

That, under such provisions, petitioner's remedy was by an appeal to the Governor-General, or, as therein provided, to the Secretary of War.

It will be noted that the sections above quoted do not specify that such an appeal shall be an exclusive remedy. It will also be noted that "the decisions of the Auditor shall be final and conclusive upon the executive branches of the government." It is fundamental that all governmental power is vested in the executive, legislative and judicial branches of the government, and the powers and duties of each branch are separate and distinct and clearly defined, and this law specifically says that the decisions of the Auditor shall be final and conclusive upon the "executive branches of the government." It does not say that his decisions shall be final and conclusive upon either the legislature or judiciary. The reason is very apparent. If the law had intended that the Auditor's decisions should also be binding upon the legislative and judicial branches, it would have said so. The fact that it says that his decisions shall be final and conclusive upon the "executive branches of the Government" is conclusive that in the instant case it was never the intent of the law that his decisions should be final and conclusive upon the courts. Again with all due respect to the Governor-General and the Secretary of War, it was never intended that either of them should exercise judicial functions or decide judicial questions of a civil nature. If the law did so provide, it might well be contended that it would be void and unconstitutional. The law having defined and limited the finality and conclusiveness of the decision of the Auditor to and upon the "executive branches of the government" only, it must follow that the appeal for which Section 25 provides is an appeal from a decision of the Insular Auditor which would be final and conclusive upon the "executive branches of the government" only, and that it was never intended that the provisions for such an appeal should apply to questions which are purely judicial.

It is very evident that when Congress enacted the law, it knew and understood the clear distinction between the

powers and duties of the executive and judicial departments of the Government. As to their legal meaning, the words "person" and "appeal," as used in Section 25 of the Jones Law above quoted, should be construed in connection with, and so they relate to, Section 24 *supra*. Both sections are portions of one and the same act.

It should be distinctly understood that what we have said in this opinion should be confined and limited to questions relating to vessels and water crafts arising under the provisions of the Philippine Tariff Act.

We have carefully read all of the evidence which was submitted to the Collector of Customs at the hearing on the protest. It is conclusive that the petitioner has a just and meritorious claim.

All of the persons, who were called as witnesses on behalf of the protest, were either representatives of firms or companies in the Philippine Islands that are engaged in the overhauling and repair of vessels, or who are skilled in that line of work, and who would have done the work that was done on the VENUS, if it could have been done in the Philippine Islands, all of them testified that, for want of proper equipment and facilities, it could not be done here.

To show that mandamus will not lie, the answer alleges that the money so paid under protest has since been converted into the Government's treasury, and hence is now beyond the reach of the courts. There is no merit in that contention, and it was not relied upon in the argument. The answer also alleges:

> "To meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 1515."

This provision is in the nature of a permanent and continuous appropriation for the payment of claims like the one in question.

The question presented is purely one of law which involves only the legal construction of Acts of Congress and the Philippine Legislature.

One of the attorneys for the petitioner has vigorously criticised and impugned the motives of the defendant. Suffice it to say that the criticism is not an element of strength in or of petitioner's brief on the merits, and that the record is conclusive that, in refusing to countersign the warrant, the defendant was acting in good faith.

For the reasons above stated, we are clearly of the opinion that the petitioner is entitled to the writ as prayed for in its petition, and it is so ordered. Neither party to recover costs.

Ten days after the publication of this decision final judgment will be entered, and five days thereafter the record will be filed.

(Sgd.) CHARLES A. JOHNS.

WE CONCUR:

(Sgd.) RAMON AVANCENA.
(Sgd.) THOS. A. STREET.
(Sgd.) GEO. A. MALCOLM.
(Sgd.) IGNACIO VILLAMOR.
(Sgd.) NORBERTO ROMUALDEZ.

Justice Johnson dissents in separate opinion.

NOTE: Mr. Justice Villa-Real took no part in the consideration of this decision.

JOHNSON, J., dissenting, with whom Mr. Justice OSTRAND concurs:

PRELIMINARY STATEMENT

This is an original action in the Supreme Court and is, in fact, an action against the state to compel it to pay an alleged indebtedness by means of a writ of mandamus. The Collector of Customs first decided that certain merchandise was subject to an import duty under the provisions of section 8, sub-paragraph 200, of the Act of

Congress of August 5, 1909, as amended by Act 2872 of the Philippine Legislature, and collected, as duty thereon, the sum of P159,960.00. Later he decided that the merchandise should have been admitted free of duty, under section 11, sub-paragraph 348, of said Act of Congress, and issued a warrant for the repayment of said sum to the petitioner. The warrant was presented to the Auditor for his counter-signature in order to obtain the payment of said sum (P159,960.00) out of the public Treasury.

The Auditor made some investigation in the premises and as a result had some doubt concerning the admissibility of said merchandise into the Philippine Islands free of duty, whereupon he requested the Collector of Customs to make a further investigation concerning the admission of said merchandise free of duty. To that request the Collector of Customs made no reply. The petitioner demanded the payment of his claim against the state. It is a claim against the state for the reason that it is paid out of the public funds of the state. This Court has ordered that the writ of mandamus issue to compel the Auditor to authorize the payment of said alleged indebtedness in the face of the admitted facts that no such indebtedness is due and payable. In other words, this Court has substituted its judgment for that of the Auditor. Thus, one of the longest established rules of the fiscal system of the Government of the United States that, "no effectual check can ever exist in any case of accounting where the same officer authorizes the expenditure and then audits it, or controls the audits of the accounts," is violated. The fiscal system of accounting, under the laws of the Philippine Islands, does not permit an officer of the Government to create, in controversial questions, an indebtedness on the part of the Government and then order its payment without the consent of the officer (the Auditor) duly authorized to first pass upon such claim or debt.

STATEMENT OF FACTS

I regret that I cannot agree with my associates in their conclusions in the present case. So long as judges disagree on questions of fact there will continue to be disagreements on questions of law.

The facts here make it necessary to discuss and interpret and define the meaning, force and application of an Act of Congress of August 29, 1916 (39 U. S. Statutes at Large, 553). The particular sections involved are sections 24 and 25. A question of law only is presented. The facts are admitted by demurrer.

In order to have a clear conception of the question of law involved, it is necessary to know and fully understand just what the facts are. In this case they are:

First. All the facts alleged in the petition and not denied by the answer;

Second. All the facts alleged in the answer.

The facts alleged in the petition and admitted to be true by the answer are:

(a) That the petitioner is a regular collective commercial partnership, duly organized, registered and existing under the laws of the Philippine Islands, and having its principal office in the city of Manila;

(b) That the respondent is the duly appointed, qualified and acting Auditor for the Philippine Islands;

(c) That Mr. Vicente Aldanese is the duly appointed, qualified and acting Insular Collector of Customs of the Philippine Islands;

(d) That the petitioner is the agent and operator of the steamship "VENUS," a steam vessel engaged in the coastwise trade of the Philippine Islands;

(e) That the Insular Collector of Customs assessed customs duties in the amount of P159,960.00 upon repairs and construction work made upon the steamship "VENUS" in a foreign port, and made demand upon the petitioner for the payment of said sum;

(f) That the petitioner paid to the said Vicente Aldanese the sum so demanded, under protest;

(g) That said protest was based upon the ground that said repairs and construction work were exempt from the payment of customs duty.

All of the other facts alleged in the petition were expressly denied by the respondent.

The facts alleged in the answer and admitted by the demurrer to be true are:

(a) That the said steamship "VENUS" is a vessel documented for the Philippine coastwise trade, with a *gross and net tonnage* of 987.64 and 597.64, respectively;

(b) That prior to February 8, 1924, said vessel needed repairs; that notwithstanding the existence and availability of adequate facilities therefor in the Philippine Islands, the petitioner caused said repairs to be done at Hongkong at a cost of $300,004, Hongkong currency;

(c) That upon the arrival of said steamship in Philippine waters on or about the 20th day of October, 1924, the Insular Collector of Customs at Manila assessed and collected customs duty on said repairs in the sum of P159,960.00; that the petitioner paid said duties under protest;

(d) That on October 31, 1924, the Collector of Customs rendered a decision upon said protest, and ordered a refund of the amount collected to the petitioner; that on October 31, 1924, the respondent received a copy of the said decision of the Insular Collector of Customs on said protest;

(e) That the sum of (P159,960.00) which had been collected by the Insular Collector of Customs, as duty upon said repairs, had been received by the Insular Collector and had been deposited in the Insular Treasury of the Philippine Government and had become a part of the general unappropriated funds of said Government, in accordance with section 14 of Act 2935; that Act No. 357, as amended by Act No. 1515, provided for refunds

of customs duties *erroneously* and *illegally* collected by the Philippine Government; that the duty and responsibility to examine, audit and settle and revise all accounts and claims for refund of customs duty rests solely and exclusively with the respondent Insular Auditor;

(f) That immediately upon receipt of the decision of the Insular Collector of Customs on said protest sustaining the same, the respondent, in pursuance of the powers and duties entrusted to him by law, made or caused to be made inquiries and investigations for the purpose of ascertaining and verifying the correctness and veracity of the assertions, that the repairs made on the steamship "VENUS" at Hongkong could not have been made and executed in the Philippine Islands, to enable *him* to determine whether the refund ordered by the Insular Collector of Customs, or the payment for the credit so claimed, was actually made for objects or purposes authorized by Act 357 as amended by Act 1515, and for the accomplishment of which the particular appropriation in said Act is available;

(g) That on November 6, 1924, the respondent, being convinced, after said investigation, that adequate facilities for the repairs made on the steamship "VENUS" are afforded in the Philippine Islands, and conscious of the duties and responsibilities entrusted to him by the Jones Law, sent a letter to the Insular Collector of Customs, requesting reconsideration of his decision on said protest, on the ground that it is openly and manifestly contrary to the weight of the evidence and to the provisions of paragraph 200, section 8, and paragraph 348, section 11, of the Philippine Tariff Act of 1909, as considered and applied by the Supreme Court in the case of Gutierrez Hermanos vs. Collector of Customs (39 P. R. 876);

(h) That later, the respondent addressed another letter to the Insular Collector of Customs, furnishing him with additional written proofs demonstrating the incorrectness of his findings on said protest, and at the same time re-

quested him (the Collector) to again review said decision in the light of the newly found evidence, with the idea of assessing and collecting duties on the repairs and construction work done on said steamship "VENUS" that could have been executed in the Philippine Islands;

(i) That no reply was received from the Insular Collector of Customs to the various requests of the respondent herein; that on the 26th day of November, 1924, the Insular Collector of Customs presented to the respondent, for counter-signature, a warrant in favor of the petitioner for the sum of P159,960.00, said warrant being for the refund of the import duty so collected;

(j) That on November 28, 1924, *the respondent returned to the Insular Collector of Customs said warrant* and informed him *that no action thereon could be taken until after the request of the respondent for the reconsideration of the decision of said Insular Collector of Customs had been passed upon by him;*

(k) That on the same day (November 28th) the said Insular Collector of Customs returned the respondent's request for reconsideration of his decision on said protest;

(l) *That at the time the petition in the present cause was filed the respondent had not yet finally decided whether or not he would approve and countersign said warrant* for the sum of P159,960.00, drawn in favor of the petitioner.

It may be added that the respondent contends that the Supreme Court is without jurisdiction to consider the questions presented, for the reason that the petitioner has another *plain, speedy* and *adequate remedy* in the ordinary course of law, without resorting to the remedy prayed for, which other plain and adequate remedy is by an appeal to the Governor-General and then to the Secretary of War.

It would seem to be unnecessary to add, under the demurrer, that no facts alleged in the complaint and denied by the answer can be considered now.

Attached to a memorandum presented by the respondent there are many exhibits. Objection is made by the petitioner to the consideration of said Exhibits because they were inadmissible under the issue presented. We agree with the petitioner that they should not be considered, and they have not been, in our consideration of the question presented.

FIRST QUESTION

Under the foregoing admitted facts the *first* question to be considered is whether or not the merchandise, in value amounting to more than 300,000 Hongkong dollars, which were placed in the steamship "VENUS" at Hongkong in order to repair it, is admissible into the Philippine Islands free of duty. The Insular Collector of Customs decided *first* that said merchandise was not admissible free of duty, and *later* decided that it was.

Prior to the Act of Congress of August 5, 1909 (39 Statutes at Large, U. S., 553; Vol. 7, Public Laws of the P. I., 367), steamships or ships operating in the coastwise trade of the Philippine Islands, when they needed repairs such as boilers, engines, etc., etc., might go to Hongkong or to some other port where labor and material were cheaper and have such merchandise placed in them and bring the same into the Philippine Islands *without the payment of an import duty*. That practice worked a great injustice not only to the ship builders in the Philippine Islands, and repair docks, but to the Government itself, in that such merchandise was brought in without payment of duties. In other words, prior to the said Act, if a citizen of the Philippine Islands desired to construct a ship here he was obliged to bring in boilers, engines, iron, etc., for that purpose, and upon which he was obliged to pay an import duty.

Realizing the injustice which then existed, the Congress of the United States provided a revenue or adopted an "Act to raise revenue for the Philippine Islands." In

Section 11 (sub-paragraph 348) of that Act, a provision was made for the admission of certain merchandise into the Philippine Islands, free of duty, when the conditions therein were complied with. Said section 11 provided, in eight different sub-paragraphs, for the admission of merchandise into the Philippine Islands free of duty. Among the other merchandise so admitted there were included "repairs to vessels documented in the Philippine Islands or regularly plying in the Philippine waters, made in foreign countries, upon proof satisfactory to the Collector of Customs that adequate facilities for such repairs are not afforded in the Philippine Islands" sub-paragraph No. 348). A very similar provision to that just quoted is found in section 8, sub-paragraph 200 of said Act of Congress, which also provides: "boats, launches, and other water crafts set up or knocked down, imported into the Philippine Islands, *cost of repairs made in foreign countries to vessels or to parts* thereof, documented in the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, 50% ad valorem" shall be collected. Said sub-paragraph 200 contains a number of provisos. The first is "that upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of sub-paragraph 348 of this Act."

This proviso was amended by an Act (No. 2872) of the Philippine Legislature of November 24, 1919, and approved by the President of the United States and put in force in the Philippne Islands by a proclamation of the Governor-General of the 11th day of December, 1919. The said amendment makes said proviso read as follows: "That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work cannot be done there reasonably economically and within a rea-*

sonable time in the judgment of said collector, such repairs shall be subject to the provisions of paragraph 348 of this Act" (Act of August 5, 1909).

Under said amendment it will be noted that repairs to coastwise vessels may be made in foreign countries even though facilities for the making of such repairs existed in the Philippine Islands if in the judgment of the Collector of Customs the same repairs could not have been made in the Philippine Islands "reasonably economically and within a reasonable time." There is nothing in the admitted facts, nor even a suggestion, that the repairs in question could not have been made in the Philippine Islands "reasonably economically and within a reasonable time," while it does appear in the admitted facts, that there existed in the Philippine Islands "adequate facilities" for making such repairs. In view of the admitted facts and in the absence of an allegation "that the work (repairs) could not have been done reasonably economically and within a reasonable time" in the Philippine Islands, upon what theory was the merchandise in question, amounting to more than 300,000 Hongkong dollars, admitted free of duty? It is evident, under the admitted facts, that the merchandise is not admissible free of duty.

SECOND QUESTION

As a second question, it may be inquired: May the Auditor of the Philippine Islands ever intervene in the settlement of accounts of the Collector of Customs, for the purpose of ascertaining and deciding whether or not a mistake was made in imposing a duty upon an imported merchandise when none should have been imposed, or in admitting free of duty such merchandise when a duty should have been collected? If the Auditor is vested with authority to inquire into the legality of the collections of the Collector of Customs, then such collections can not be final and conclusive.

May the Collector of Customs today collect an import duty on merchandise, turn the collections into the public Treasury of the Government, and then tomorrow decide that the collection was erroneously made, and render a final decision ordering that the same be paid out of the Treasury, without satisfying the Auditor that the collection was, in fact, *erroneously* made? May the Collector himself thus create a demand or claim *against the Government which the Auditor cannot question?* If so, then the same officer may create a claim against the Government and at the same time audit it. Can that be done in the face of the provisions of section 1 of Act 3036, which provides that "the authority and powers of the Bureau of Audits extend to and comprehend all matters relating to accounting procedure, including the keeping of the accounts of the Government, the preservation of vouchers, the method of accounting, the examination and inspection of the books, records and papers relating to such accounts, and to the audit and settlement of the accounts of all persons respecting funds or property received or held by them in an accountable capacity, as well as to examine and audit *all debts* and *claims* of any sort due from or owing to the Government of the Philippine Islands in any of its branches?"

I maintain that, both under the Act of Congress and the statutory laws of the Philippine Legislature, the Auditor has jurisdiction over the collection of customs duties as well as over their refund, and give the following provisions of the Act of Congress and the statutory laws of the Philippine Legislature in support of that contention:

(a) Section 24 of the Act of Congress of August 29, 1916, confers upon the Insular Auditor of the Philippine Islands the following powers:

1. "The Auditor shall examine, audit, and *settle* all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government."

2. "He shall audit, in accordance with law and administrative regulations, all expenditures of funds pertaining to the Government."

3. "The administrative jurisdiction of the Auditor over accounts, whether of funds or property and of vouchers and records pertaining thereto, shall be exclusive."

4. "The Auditor is authorized to communicate directly with any person having claims before him for settlement."

5. "In the execution of their duties the auditor and deputy auditor are authorized to summon witnesses, administer oaths, and to take evidence, and, in the pursuance of these provisions, may issue subpoenas and enforce the attendance of witnesses, as now provided by law."

6. "The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury."

(b) The very last word of the Philippine Legislature upon the question of the authority of the Auditor relating to the auditing of accounts by section 1 of Act 3036, provided:

1. For the general jurisdiction, authority and power of the Auditor; and

2. That such jurisdiction, authority and power shall extend to and comprehend all matters relating to accounting procedure, etc., etc., as well as to the examination and audit *of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches.*

It would be difficult, if not impossible, in a statutory provision to use words in the English language which would more definitely and conclusively confer jurisdiction upon the Insular Auditor over the claim which the petitioner now presents for allowance. The voucher prepared by the Collector of Customs and presented for

counter-signature by the petitioner in the present case unquestionably represents a debt or claim against the Government of the Philippine Islands pertaining to the revenues thereof. Both the Act of Congress and the acts of the Philippine Legislature expressly provide that the Auditor shall *examine, audit all debts and claims of any sort due from or owing to the Government* of the Philippine Islands in any of its branches. No one will deny that the department of customs is one of the branches of the Philippine Government.

It is the theory of the majority opinion that the decision of the Collector of Customs is final and that the Auditor has no jurisdiction, right or authority to question his decision. In support of that contention there is cited Act No. 2872, which amends sub-paragraph 200 of section 8 of the Act of Congress of August 5, 1909. (Vol. 7, Public Laws, P. I.) Said sub-paragraph 200 of the Act of Congress of August 5, 1909, in relation with sub-paragraph 348 of the same Act, provided for the admission into the Philippine Islands, free of duty, of merchandise used in making repairs in a foreign port on vessels documented for the Philippine coastwise trade. Said merchandise were to be admitted free of duty if "upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs" the same shall be admitted free of duty under the provisions of sub-paragraph 348 (Sub-paragraph 200, proviso 1, and sub-paragraph 348 of Act of Congress of August 5, 1909).

Act No. 2872 of the Philippine Legislature and approved by the President of the United States amended said sub-paragraph 200 of the Act of Congress of August 5, 1909, so that the first proviso read as follows: "That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work can be done reasonably economically and within a reasonable*

time, in the judgment of said Collector, such repairs shall be subject to the provisions of sub-paragraph 348 of the Act of Congress of August 5, 1909." The majority opinion contends that said act gives the Collector authority to finally decide the question whether or not said merchandise, in the way of repairs, may be admitted free of duty, and having decided, his decision cannot be questioned, unless, in accordance with the provisions of sections 1383, 1384, and 1386 of the Administrative Code (Act 2711) the question is removed into the Court of First Instance. Section 1383 provides that the party aggrieved by the decision of the Insular Collector of Customs * * * may procure the cause to be removed for review into the Court of First Instance. Said section further provides that, "unless the proper party (aggrieved party) shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him" (the party aggrieved). Clearly, under said section the petitioner could not "procure the cause to be removed into the Court of First Instance" for the reason that he is not aggrieved at the decision of the Collector of Customs. His complaint is that he is aggrieved at the decision of the Auditor.

Said section 1384 provides as to who may procure the cause to be removed for review in the Court of First Instance. It provides that "the removal of a cause into court may be had at the instance of the protesting party, etc." If the decision of the Insular Collector is adverse to the Government the cause may be removed in the manner hereinafter specified, by order of the department head. It will be noted that under the provisions of section 1384 the cause may be removed for review in the Court of First Instance by order of the department head. In the present case the department head (Secretary of Finance) failed and refused to remove the present cause for review in the Court of First Instance even though requested so to do.

Said section 1386 provides what shall be done in perfecting the removal for review in the Court of First Instance when the department head so orders. The department head in the present case, not having ordered the removal, then certainly said section (1386) can have no important bearing upon the issues presented nor upon the finality of the decision of the Collector of Customs.

Referring again to the provisions of said Act No. 2872 and to that provision "that upon proof satisfactory to the Collector of Customs, etc.," we desire to state that, that provision adds nothing to the power and authority of the Collector of Customs. Every piece of dutiable merchandise imported into the Philippine Islands is admitted upon the payment of duty or without duty "upon proof satisfactory to the Collector of Customs." The Collector of Customs is the sole judge in the first instance upon the question whether or not merchandise shall be admitted free of duty, and, of course, it must follow that said admission is "upon proof satisfactory" to him. We find no justification in the provisions of said Act 2872 nor in said sections 1383, 1384, and 1386 of the Administrative Code for the contention that the decision of the Collector of Customs is final against the Auditor in the present case, any more than in any other case where dispute arises concerning the admission of merchandise into the Philippine Islands with or without duty. The reports of the Supreme Court of the Philippine Islands contain many cases reversing the decision of the Collector of Customs when the duty was paid under protest and upon the ground that the merchandise should have been admitted free of duty.

It will also be noted that none of said provisions of the law make any reference whatever to the jurisdiction and authority of the Auditor. In the present case the Collector of Customs created a claim against the Philippine Government by issuing the warrant in question. The warrant, if held to be valid and binding obligation, be-

comes an obligation on the part of the Philippine Government to pay it. It is a debt, if valid, against the Government and, in our judgment, both the act of Congress and the long chain of acts of the Philippine Legislature clearly support "the authority and power of the Auditor to audit and settle the accounts of all persons respecting funds or property received or held by him in an accountable capacity, as well as to the examination and audits of all *debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches.*" (Act 3066 amending section 584 of Act 2711.)

Not only has the Auditor jurisdiction over the present matter as a claim *against the Government*, but it is clearly evident from both the Act of Congress and the acts of the Philippine Legislature that he has jurisdiction from the point of view of determining whether the claim if just can be paid from funds of the Government in accordance with the terms of a specific appropriation. The claim of the petition is a claim against the Insular Government arising out of the receipt of revenues, and under the law the Auditor must determine whether the claim comes under the terms of a particular appropriation. The mere fact that a general standing appropriation of the public funds is made, cannot be used for the purpose of liquidating particular claims until it is shown to the satisfaction of the Auditor that the particular claim falls under the general standing appropriation. There is only one exception to that rule and that is in the case where the Legislature specifically and unequivocally appropriates a certain amount of money for specific purpose.

Not only is the Auditor given "authority and power to audit all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches" but under the provisions of the Act of Congress of August 29, 1916, he is given power to summon and enforce the attendance of witnesses, to ad-

minister oaths and to hear evidence upon all such claims. Under the law, in our judgment, the Auditor is not a mere machine to register the opinions and decisions of others. He is required to certify balances due. He is required to exercise his judgment. He is not justified in following the judgments of others. His action upon a particular claim presented, is a decision, and that decision is by the law presumed to be made after an intelligent scrutiny of all of the facts relating to the claim itself and of the vouchers presented in support thereof. The Auditor is not only judge of the law but of the facts in such cases, and he would not be justified in accepting the views, opinions, findings or rulings of any other officer of the Government upon the claim or on the vouchers therewith submitted. His duties generally are discretionary in the highest degree. He is presumed to state the accounts according to the law and the facts. For him to admit claims which in his judgment are incorrect, would be not only a violation of the law but of his oath of office.

On whom did the Congress of the United States and the Philippine Legislature cast the burden of determining, for the Auditor, whether warrants coming before him for counter-signature are not warranted, authorized or justified by law? If on no other than the Auditor himself, would the Legislature not have indicated, expressly or impliedly, what officer? In the absence of such indication or of the slightest trace of a disposition or purpose to make the counter-signing a mere ministerial attestation it would seem to be clearly beyond dispute that the Legislative authority used in its obvious universal meaning the language in which it clarifies the Auditor's duty to countersign warrants; that by the inevitable force of the language used in the various laws, the Auditor has the sole responsibility and jurisdiction to pass upon claims in favor of or against the Government. That being true, he must determine for himself as to the legality of claims

presented. He must determine for himself as to such legality, whether his decision agrees or disagrees with the judgment of the persons who present the claim. In the performance of his official duty, the Auditor must exercise his own discretion and judgment; and such exercise is not an intervention of the discretion or a revision of the judgment lawfully exercised in relation to the same matter at a previous stage, by any other authority in the Government. In deciding that a particular warrant which comes before him for counter-signature is not warranted by law, and that he will therefore not countersign it, the Auditor does not assume to reverse or annul the prior action of any other officer in the Government. The Auditor simply exercises his own judgment in a matter concerning which the law has clothed him with a discretionary power or trust.

It is the duty of the Collector of Customs to construe and apply the customs laws, but it is the duty of the Auditor to see that in the collection of revenues and the expenditure of public funds of the Government, the law has been followed and that it has been properly interpreted.

We maintain that all the acts of the Philippine Legislature, including the Act of Congress, commencing with the order of May 8, 1899, down through all the acts of the Philippine Legislature Nos. 90, 145, 215, 328, 355, 361, 456, 807, 864, 907, 1402, 1792, 2711, 3036 and the Act of Congress of August 29, 1916, fully support the doctrine that the Auditor of the Philippine Islands has jurisdiction and authority to audit and decide finally, unless there is an appeal in accordance with the provisions of the law, debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches.

It should be remembered that the P159,960.00 in question was turned into the Treasury and had become a part of the public funds of the Philippine Government. *It is*

contended, however, that inasmuch as the Philippine Legislature (the United States Philippine Commission) provided a permanent annual appropriation "to refund moneys *erroneously received* and covered into the Treasury, including all cases of amounts deposited by officers as revenue collected," *that* the Collector of Customs may, on his own account and by his own authority, order the payment of any "*moneys erroneously received* and coveved into the Treasury" without the consent of the Auditor (Act 357 as amended by Act 1515).

The petitioner insists that by virtue of said provision of law the Auditor is under obligation to allow the payment of warrants like the one in question, without the exercise of any discretion whatever. That contention simply means that the Collector of Customs may finally decide, and without the possibility of having his decision questioned, that the "moneys *erroneously* received and covered into the Treasury," should be repaid. In other words, under the contention of the petitioner, the Collector of Customs has full and final authority to decide (a) that the moneys were *erroneously* received and covered into the Treasury; and (b) to order the repayment of such moneys, without the right of the Auditor to inquire into the question whether or not the moneys were, in fact and under the law, erroneously received.

As has been argued in this dissent, under the law the Auditor must scrutinize carefully the precise terms of every appropriation before he can approve an expenditure under it. Especially is this true in the case of continuing annual appropriation of long standing, in which no definite amount is set up. Such an appropriation is exceedingly dangerous, and without continual watchfulness the Government could be quietly bled of a large share of its revenues. Without some competent and efficient check upon the Collector of Customs or other collectors of public revenue, it is conceivable, if repayments are left to their individual discretion, that a large part of the duties

collected might be refunded upon protest if this Court establishes the precedent contended for in the present case, and the Government might thus be deprived of the funds absolutely necessary to continue its operations.

It will be noted, by reference to said acts, that they only permit the refund of moneys *erroneously received.* Under the law, who is to decide the question whether or not the moneys were in fact *erroneously received?* In view of the provisions of the acts of Congress and the Philippine Legislature, we are of the opinion that the Auditor must satisfy himself that the money in question, in the present case amounting to P159,960.00 was *erroneously collected.* That involves a careful investigation of the facts upon which he must base his decision. The forming of a decision which it is his sworn duty to make, very obviously demands an exercise of discretion, for there is not the slightest indication in the words of said acts, that the Auditor is to be bound by the opinions or decisions by any person or official of the Government.

The money which the Collector of Customs is now attempting to get out of the public Treasury, based upon said permanent appropriation, is simply appropriated to meet the refund of moneys *erroneously collected.* If the Legislature intended that the Auditor should be bound by the decision of the Collector of Customs, it would have so stated in plain terms. In view of the fact that under the law in force in the Philippine Islands, *no money can be paid out of the Treasury except by warrant* and no such warrant is valid unless it is *counter-signed by the Auditor,* it is plainly evident that, in the absence of anything in the law to the contrary, the Auditor is fully within his authority in refusing to countersign such warrant until and unless he has satisfied himself, that the money in question was, in fact and actually, *erroneously collected.* No effectual check can ever exist upon the expenditure of public funds in any case where the same officer authorizes the expenditures and then audits, or controls the audits of the accounts. (Lamb vs. Phipps, 22 P. R. 479.)

The great Chief Justice Marshall, in the case of Marbury vs. Madison (1 Cranch, U. S., 168), said:

> "We cannot issue the writ of mandamus in any case where the *proper remedy is by appeal, merely because the appropriate remedy may involve an inconvenient delay.*"

Inasmuch as said standing appropriation can only be used in payment of *"moneys erroneously collected,"* and inasmuch as it is the duty of the Auditor to safeguard the public Treasury and not allow funds to be paid out of the same until he is satisfied that both under the facts and the law they should be paid, we are confident in our belief, that it is the bounden duty, under the law, for the Auditor to decide, in the final analysis, whether or not the moneys had been in fact *erroneously collected.*

THIRD QUESTION

The third question which presents itself under the admitted facts is, whether or not the *decision* of the Insular Auditor, in refusing to countersign the warrant in question before he was informed fully concerning the causes which led the Collector of Customs to reverse his former decision, in which a duty was collected upon the merchandise in question, and decided that said merchandise should be admitted free of duty, was *final* until the same was reversed in accordance with the provisions of sections 24 and 25 of the Jones Law (Act of Congress, Aug. 29, 1916, 39 Statutes at Large, U. S. p. 553; Vol. 12 Public Laws of the Philippine Islands, 237).

One of the subdivisions of said section 24 provides that, "the decision of the Auditor shall be *final and conclusive* upon the executive branches of the Government, except that appeal therefrom may be taken by the *party aggrieved* or the head of the department concerned within one year, in the manner hereinafter prescribed. The Auditor, shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the *Comptroller of the*

United States Treasury, and is authorized to communicate directly with any person having claims before him for settlement, or with any department officer or person having official relations with his office." The provision with reference to the method and time of appeal is prescribed by section 25 of said Act. Said section (25) provides "that *any person aggrieved* by the action or decision of the Auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the Auditor to which exception is taken, with the reason and authorities relied on for reversing such decision."

It will be noted from said quoted provisions that the decision of the Auditor shall be *final* and *conclusive* unless appeal therefrom in writing is taken by the party aggrieved or the head of the department concerned within one year to the Governor-General, etc. It is argued that, that provision making the decision of the Auditor *final* and *conclusive* does not apply to the courts, for the reason that the above quoted provision is, that the decision of the Auditor shall be *final* and *conclusive* upon the executive branches of the Government only. That argument is made, however, without taking into consideration that provision of the law which immediately follows and which is "*except that appeal* therefrom may be taken by the party aggrieved, etc.," which must be that the decision of the Auditor is final and conclusive upon the executive branches of the Government *only* when the person or head of the department aggrieved appeals within one year. *It seems to us that a doctrine that a decision which is final and conclusive as to one department of the Government is not also final and conclusive as to every other department of the Government, cannot be given serious consideration on the part of a disinterested and conscientious court.*

It is further argued that the decision of the Collector of Customs, ordering the return of the duties collected,

was final and conclusive and therefore the Auditor was without authority or jurisdiction to even inquire into his decision. In support of that contention our attention is called to section 1383 of Act 2711 (Administrative Code). It will be noted upon reading said section that no such conclusion can be drawn therefrom. It is not even intimated that his decision is *final* and *conclusive* as to any one *except the person making the protest.* The law expressly provides that "the action or decision of the Insular Collector shall be *final* and *conclusive against him* (the protestant) and then only final and conclusive unless the party shall procure the cause of the protest to be removed into court for review. In other words, said section simply provides that the decision of the Collector of Customs shall be *final* and *conclusive against the protestant* unless he appeals therefrom. There is no intimation in said section that the *decision* of the Insular Collector of Customs shall be *final* against the Auditor.

AUTHORITY OF THE AUDITOR OF THE PHILIPPINES—A RESUME OF THE LEGISLATION ON THAT QUESTION.

Considering, under the provisions of section 24 of the Act of Congress of August 29, 1916, that "the Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury," etc., and that "the decisions of the Auditor shall be *final* and *conclusive*," etc., it becomes important for the decision of the question before us to ascertain:

First. What is the "like authority conferred by law upon the auditors and the Comptroller of the United States Treasury" and,

Second. What are the particular powers and duties relating to the final and conclusive decisions of the Auditor of the Philippine Islands, as provided for by law.

FIRST.—WHAT ARE THE POWERS AND AUTHORITY, AND THE FINALITY AND CONCLUSIVENESS OF THE DECISIONS OF THE AUDITORS AND THE COMPTROLLER OF THE UNITED STATES TREASURY?

Very early in the history of the Federal Government of the United States it became advisable to have accounting officers. For that purpose Congress provided for the settlement of accounts by auditors and comptrollers of the Treasury. The Congress of the United States very early in its history discovered that "no effectual check can ever exist in any case (of accounting) where the same officer authorizes the expenditure and then audits it, or controls the audits of the accounts." See Senate Document No. 6, p. 5, of the Second Session of the 23rd Congress of the United States.

Congress very early provided that all *controversial* or questioned accounts should be passed upon by auditors or by the Comptroller of the Treasury and that their decision should be *final* and *conclusive*. That has been the doctrine in the Federal Government of the United States for nearly one hundred years. Experience taught those who were responsible for the financial administration of the Federal Government that mere paper balances are not always reliable; that the actual funds and property of the Government are not always visible in such balances. The question which we are now discussing is not a new one. As early as the administration of Presidents Monroe, Adams, Jackson and Polk, we find that the same question was up for decision. During the administration of President Monroe and President Adams the doctrine, so clearly and explicitly stated, appears to have been uniformly adhered to. President Jackson, who was not apt to shun responsibility that belonged to him, fully acknowledged his want of authority over the accounting officers in the settlement of claims. Messrs. Peebles and Gorham, contractors for supplies in the subsistence de-

partment of the United States army, being dissatisfied with the final adjustment of their account by the Comptroller, applied to President Jackson for relief, who referred the application to the Secretary of War, by whom, through the Commissary-General, a report was made July 1st, 1835. The opinion of President Jackson, in his own original autograph, is found indorsed on the papers in the auditor's office, as follows: "The report made—attorney-general's opinion—referred to. The decision of the Comptroller is final, over whose decisions the President has no power, except by removal. The Secretary of War will make known this decision to Mr. Peebles. A. J."

Again, during President Polk's administration an application was made to him to interfere with the adjustment of the same claim which he declined to do, making his indorsement on the papers as follows: "I have considered the application in the case to open the accounts of Bryant, etc., Co., and decline to interfere upon the ground that Congress has expressly given the authority to settle claims to the accounting officers (Comptroller) of the Treasury Department, and that I have no right to control these officers in the performance of their duty. August 9, 1845. J. K. Polk."

In the case of Decatur vs. Paulding (14 Peters, 497 (1840)) Mr. Chief Justice Taney, speaking for the Court said:

"Where a law imposed a duty which required the exercise of judgment and discretion the court had no right, by mandamus, to control his judgment, and guide him in the exercise of a discretion which the law had confided to him."

In the case of the United States vs. Arredondo et al. (6 Peters, U. S., 689, 729) the Supreme Court of the United States said:

"He (the Auditor or Comptroller) is required to certify balances due in favor of or against the Government.

To certify is to make certain. To make a certificate is to exercise judgment and discretion. He is required to render decisions upon the legality of claims, and his conclusions are not *mere opinions.* In rendering decisions, judgment and discretion must necessarily be exercised. A decision is by the law presumed to be made after an intelligent scrutiny of all the facts has been made. In the discharge of his duty (Auditor or Comptroller's) he is judge not only of the law but of the facts; and he would not be justified in accepting views, opinions, findings or rulings of any other officer of the Government upon the claims or vouchers admitted. In the performance of his duties, the Auditor is not subject to the jurisdiction of any officer of the executive branch of the Government *nor to that of any court of the judicial branch.* He is not a mere machine to register or blindly execute the opinions or acts of other officers in matters which pertain, by the laws of the fiscal system to the Government, by well defined public policy, and by long practice, to the jurisdiction of the accounting officer—a jurisdiction which it is his duty to maintain even in cases in which its existence may be doubtful."

The legislative department of the Government would not have made the decisions of the auditor *final and conclusive,* unless an appeal is taken therefrom, without intending to give to the auditor and Comptroller an uncontrollable discretion in fully examining and scruitinizing every account presented against the Government. The power to certify a balance, for a like reason, includes the authority to review and decide all questions of law and fact *and to use all sources of information for that purpose.* A settlement of an account and certificate of a balance which can not go to the sources of evidence and examine all questions of law and fact, would be practically no examination at all.

In the case of Longwill vs. U. S. (17 Court of Claims, 291) it was said:

"The accounting officers of the Treasury are no doubt bound to scrutinize claims and accounts with great care, as is their custom, and it is the undoubted right of those who have the authority to decide thereon to reject in whole or in part, as their judgment dictates, all those claims which they have reasonable cause to suspect are tainted with fraud or in which they believe there may be substantial defect in law or as to the validity of which they are in doubt."

In the case of the Board of Liquidation vs. McComb (92 U. S. 541) the Supreme Court of the United States said:

"The objections to proceedings against state officers by mandamus or injunction are: *first*, that it is, *in fact, proceedings against the state itself;* and, *second*, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of an executive officer in matters belonging to the proper jurisdiction of the latter." (Work vs. U. S. Ex rel. Rives, Decision of the Supreme Court of the United States, March 2, 1925, and cases cited. 69 Law Ed.; Work vs. United States, Ex rel. Chestatee, decided March 2, 1925, 69 Law Ed.)

For the courts to require an auditor or Comptroller to allow or disallow a claim against or in favor of the Government would be to substitute the courts as the auditing officer of the Government. Such a result was not contemplated by Congress when it conferred final and exclusive jurisdiction upon the auditing department of the Government (Kendall vs. U. S., 12 Peters, 524; Decatur vs. Paulding, 14 Peters 497; The Borough, etc., vs. Pennsylvania, 34 Pa. 294.)

Under the statute of the United States the auditor and Comptroller of the Treasury are, by statute, authorized to examine accounts and to certify balances thereon.

The exercise of that power necessarily involves the exercise of judicial discretion. Judicial action can not be subject to any control or direction except by law or by an appeal. It is independent of all control except by law. The authority so given by statute should be exercised with that untrammeled independence of judgment which is essential to its proper exercise.

In the case of the U. S. vs. Lynch (137 U. S. 280) a petition was presented to compel the Comptroller to pay the petitioner the sum of $288.60, being an amount remaining unpaid for travel expenses incurred under an act of Congress. Upon the consideration of a demurrer to the petition that Court said: "That mandamus will not lie against an officer of the Treasury Department for refusal to allow and pay a claim against the United States, for, however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is *none the less, in effect a suit against the United States.*" (Decatur vs. Paulding, 14 Peters, 497 (1840.))

In the case of Riverside Oil Co. vs. Hitchcock (190 U. S. 316) Mr. Justice Peckham, speaking for the Court and after citing and discussing the case of Decatur vs. Paulding, said:

"That the decision of the questions presented to the Secretary of the Interior was no *merely formal or ministerial act* as shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. *Whether he decided right or wrong is not the question.* Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus."

In the case of Bates, etc., vs. Payne (194 U. S. 105) Mr. Justice Brown, speaking for the Supreme Court, said:

"That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of the department, his decision thereon is conclusive unless the law allows an appeal." (Lamb vs. Phipps, 22 P. R. 456.)

Dr. James L. High, one of the clearest American law writers, in his valuable work on "Extraordinary Legal Remedies" in section 102, after discussing the right of the courts to coerce the performance of purely ministerial duties, said:

"Where, however, auditing officers entrusted by law with the duty of passing upon and determining the validity of claims against the state, are vested with powers of discretionary nature as to the performance of their duties, a different rule from that above stated prevails. In such cases the fundamental principle denying relief by mandamus to control the exercise of official discretion applies, and the officers having exercised their judgment and decided adversely to a claimant, mandamus will not lie to control their decision or to compel them to audit and allow a rejected claim. The remedy, if any, for such a grievance, must be sought at the hands of the legislature, and not of the courts. (Auditorial Board vs. Arles, 15 Tex. 72; Auditorial Board vs. Hendrick, 20 Tex., 60; Towle vs. State, 3 Fla., 202; State vs. Doyle, 38 Wis., 92; People vs. Auditor of Colorado, 2 Colo. 97; State vs. Oliver, 116 Mo., 188; Burton vs. Furman, 115 N. C., 106; Wiles vs. Smith, 76 Md., 469; State vs. Babcock, 22 Neb., 38; State vs. Boyd, 36 Neb., 60.) Especially will relief by mandamus be refused in such cases when the party aggrieved has a *plain and adequate remedy by appeal* from the refusal of the auditing officer to allow his claim. And when an auditor or a comptroller is vested with certain discretionary powers in the adjusting and settlement of demands against the state, he cannot be compelled to issue his warrant or liquidate said claim for the payment of a particular sum, nor will

the writ go to compel an officer to audit a claim unless it is clearly his duty so to do. (Wailes vs. Smith, 76 Md., 469; Drew vs. Russel, 37 Vt., 250.)"

Mr. Spelling, in his work on "Injunctions and Other Extraordinary Remedies," in a very learned and extensive discussion of the questions now before us says that mandamus will not lie in any matter requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confined by law, either to control the exercise of that discretion or to determine the decision which shall be finally given but only to *set him in motion and compel him to exercise his function according to some discretion when he has refused or neglected to act at all.* (United States vs. Seaman, 17 How., 225; People vs. Fairchild, 67 N. Y., 334; State vs. Board of Liquidators, 29 La. Ann., 264; Freeman vs. Selectmen of New Haven, 34 Conn., 406, Rutter vs. State, 38 Ohio, 496; United States vs. Commissioner, 5 Wall, 563; People vs. Board of Commissioners of Cook County, 176 Ill., 576; People vs. Maher, 141, N. Y., 330; Boyne vs. Ryan, 100 Cal., 265.) And *of course, where another remedy exists,* as under the express statutes of the Philippine Islands, mandamus will not be granted.

Mr. Merril, in his work on "Mandamus," in discussing the same question says: (Sec. 32)

"The writ lies to make a body or officer charged with a duty, involving judgment or discretion, *to take action in the matter.* When a subordinate body is vested with power to determine a question of fact, the duty is judicial and though it can be compelled by mandamus to *determine the fact it can not be directed to decide in a particular way,* however clearly it may be made to appear what decision ought to be. A court will be ordered to proceed to judgment, but it will not be instructed to render a particular judgment. * * * When a decision has been reached in a matter involving discretion,

a writ of mandamus will not lie to review or correct it, no matter how erroneous it may be."

Mr. Arthur L. Sanborn, one of the ablest of the judges of the United States District Court for the western district of Wisconsin, in his article on "Mandamus," published in volume 26 of the Cyclopedia of Law and Procedure (Cyc.), in discussing the right of the courts to issue mandamus against an auditor, says:

"Where a state auditor in the discharge of his duties has a discretion to exercise, as for instance in the allowance or rejection of a claim against the state, his decision cannot be controlled by mandamus * * *. Where there is another adequate remedy, as for instance, where the right of appeal is given to a claimant whose claim has been disallowed in whole or in part by the auditor, the writ will not lie." (26 Cyc. 237.)

In speaking of the remedy by mandamus against the comptroller, Mr. Sanborn says: (26 Cyc., 239.)

"But the writ will not lie where its effect would be to interfere with the comptroller in matters requiring the exercise of judgment and discretion on his part. Thus, it is held that a comptroller cannot be compelled to audit claims against the state in any particular way or for any particular amount. In the same way, where the duty of the comptroller to perform the act in question is not clear, or where there is *another adequate remedy* at law, the writ will not lie. (Patty vs. Colgan, 97 Cal., 251; People vs. Roberts, 163 N. Y., 70.)"

Not only has it been the uniform doctrine maintained by the authorities of the Government of the United States and the law writers that those who are charged with the responsibility of auditing accounts in favor of and against the government must be left absolutely free and untrammeled, but the *state* governments of the United States as well have established the same doctrine. In case of Holliday vs. Henderson (67 Ind., 103) the court said:

"Where a state auditor in the discharge of his duties has a discretion to exercise, as for instance, in the allowance or rejection of a claim against the state, his decision cannot be controlled by mandamus, *especially after the auditor has already acted upon the matter.*" (26 Cyc., 237.)

See also the following cases: (Danley vs. Whiteley, 14 Ark., 687; People vs. Colorado Territorial Auditor, 2 Col., 97; State vs. Thompson, 41 Mo., 13; State vs. Barnes, 25 Fla., 298 (23 Am. St. Rep., 516); Wailes vs. Smith, 76 Md., 469; Lewright vs. Love, 95 Tex., 157; People vs. Adam, 3 Mich., 427; Burton vs. Furman, 115 N. C., 166; County of San Luis Obispo vs. Gage, 139 Cal., 398; People vs. Roberts, 163 N. Y., 70; Rutgers College vs. Morgan, 71 N. J. L. 663; State vs. Nolan, 8 Lea, 663; People vs. Attorney-General, 41 Mich., 728; Thompson vs. Watson, 48 Ohio, 552; Ewbank vs. Turner, 134, N. C., 77; State Board of Dental Examiners vs. People, 123 Ill., 227; State vs. Slocum, 34 Neb., 368.)

SECOND.—WHAT ARE THE PARTICULAR POWERS AND DUTIES RELATING TO THE FINAL AND CONCLUSIVE DECISIONS OF THE AUDITOR OF THE PHILIPPINE ISLANDS, AS PROVIDED FOR BY LAW?

The following is a brief history of legislation for the Philippine Islands relating to the appointment, and authority of the Auditor *in the settlement of accounts* and claims against the Government.

First.—*During the Military Government.*

One of the very first orders, by President McKinley, as commander in chief of the military forces in the Philippine Islands, provided for the protection of the public funds in the Treasury. President McKinley issued an

executive order, from which the following paragraphs are quoted:

"By virtue of the authority vested in me as commander in chief of the army of the United States, I hereby order and direct that during the maintenance of the military government by the United States in the Islands of the Philippine Archipelago, there is hereby created and shall be maintained the office of the auditor for the Islands, to be filled by appointment of the Secretary of War, whose duty shall be to receive and audit all accounts of the Islands.

"All rules and instructions necessary to carry into effect the provisions of the executive orders relating to said Islands shall be issued by the Secretary of War, and such rules and instructions shall be in force until the same are amended or revoked by the Secretary of War."

Under the instructions of the President and the executive order of the War Department (Executive Order May 2, 1899), certain rules and instructions which, after having received the approval of the President and Secretary of War, were transmitted to the United States Philippine Commission for enactment in the form of statute, which was done by Act 90 of the United States Philippine Commission. It was provided by the Secretary of War that the statutes so enacted could not be modified without the previous consent of the Secretary of War (letter by Secretary of War to the President (Mr. Taft) of the United States Philippine Commission, of Jan. 7, 1901).

From said rules and instructions we find the following pertinent provisions:

"Rule 2. The Auditor for the Islands shall receive, examine and settle all accounts pertaining to the revenue and receipts derived from the Islands and expenditures paid therefrom, and certify the balance thereof to the military governor and shall preserve the accounts and vouchers after settlement.

"Rule 41. Every contract under which payment may be made shall be submitted to the Auditor with the account to which such payment pertains.

"Rule 44. The jurisdiction of the Auditor for the Islands over accounts and all vouchers pertaining thereto shall be exclusive. His decision shall be final and conclusive upon the administrative branches of the military government except that appeals therefrom may be taken by the party aggrieved or the head of the department concerned, within one year, in the manner prescribed in rule 72. The Auditor for the Islands shall, except as herein otherwise provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury, and is authorized to communicate directly with any person or officer having claims before him, for settlement or with any officer or department having official relations with his office.

"Rule 72. Any person aggrieved by the action or decision of the Auditor in the settlement of his account or claim by that officer may within one year take an appeal in writing to the military governor, which shall specifically set forth the particular action of the Auditor to which exception is taken, with the reasons and authorities relied on for reversing such action. If the military governor shall confirm the action of the Auditor he shall so indorse the appeal and transmit it to the Auditor, and the action of the Auditor shall thereupon be final and conclusive. Should the military governor fail to sustain the action of the Auditor, he shall forthwith report his grounds of disapproval to the Secretary of War, together with the appeal and papers necessary to a proper understanding of the matter. The decisions of the Secretary of War in such cases shall be final and conclusive."

Second—During the Civil Government

The "Taft United States Philippine Commission" at the very beginning of the exercise of its legislative power took steps to provide for an accounting of public funds by responsible accounting officer. Said commission on the 28th day of February, 1901, enacted into a statute, known as Act 90, the executive order of May 8, 1899, including therein the provisions of an executive order issued by President McKinley on the 23rd day of February, 1901. Commencing with said executive order of May 8, 1899, under the military government, which was brought forward and enacted into a statute by Act 90, under the civil government, we believe that the following acts show all of the important legislation adopted by the Philippine Legislature and Congress relating to the duties, power and authority of the Auditor of the Philippine Islands: Acts Nos. 145, 195, 215, 328, 361, 456, 807, 909, 1402, 1792, 3036, and sections 24 and 25 of the Act of Congress of August 29, 1916.

Passing over the similar provisions of said acts, we come first to Act No. 1792, which was known as the "Accounting Act," which was adopted with the consent of the Secretary of War of the United States. Section 2 of that act provided that "there shall be an auditor for the Islands, who shall be Director of the Bureau of Audits, and who shall be appointed by the Secretary of War, with the concurrence of the Governor-General and the approval of the Philippine Commission. The duty of the Auditor shall be to examine, audit, and *settle* all accounts pertaining to the revenue and receipts from whatever source of the Insular Government, etc., and to audit, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to or held in trust by the Insular Government, etc."

Section 6 of said Act (1792) provided that:

"The jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and rec-

ords pertaining thereto, *shall be exclusive*. With the approval of the Governor-General he shall from time to time make and promulgate general or special rules and regulations not inconsistent with law covering the methods of accounting for public funds and property, and funds and property held in trust by the Insular Government or any of its branches: *Provided*, That any Director of Bureau or other officer accountable for public funds or property under the provisions of this Act may require such additional reports or returns from his subordinate or others as he may deem necessary for his own information and protection.

"The *decisions* of the Auditor *shall be final and conclusive* upon the executive branches of the Government, except that appeal therefrom may be taken by the party aggrieved or the head of the Department concerned, within one year, in the manner hereinafter prescribed. The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several Auditors of the United States and the Comptroller of the United States Treasury, and is authorized to communicate directly with any person having claims before him for settlement, or with any Department, officer, or person, having official relations with his office."

Section 36 of said Act (1792) provided that:

"Any person aggrieved by the action or decision of the Auditor in the settlement of his account or claim may within one year take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the Auditor to which exception is taken, with the reason and authorities relied on for reversing such decision. If the Governor-General shall confirm the action of the Auditor, he shall so indorse the appeal and transmit it to the Auditor, and the action shall thereupon be final and conclusive. Should the Governor-General fail to sustain the action of the Auditor, he shall forthwith transmit his grounds of disapproval to

the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive."

Section 11 of said Act 1792 provided for the appointment of a Treasurer of the Philippine Islands, who shall receive and safely keep all moneys arising from the revenues and receipts of the Islands from whatever source derived * * * and shall disburse the same *only* on warrants, *countersigned* by the Auditor, etc. From a comparison with section 6 above quoted, with rules 44 and 72, and the executive order of May 8, 1899, as brought forward and made a part of said Act 90, it will be seen that the only difference, in fact, is that the "military governor" has been changed to the "Governor-General."

The foregoing quotations show what the law was relating to the powers, duties and authority, and conclusiveness and finality of the decisions of the Auditor at the time of the adoption of the Act of Congress of August 29, 1916.

With reference to sub-paragraphs 5 and 6 of section 24 of said Act of Congress, we find the following provisions relating to the "powers, duties and authority, and conclusiveness and finality" of the decisions of the Auditor:

"The administrative jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive. With the approval of the Governor-General he shall from time to time make and promulgate general or special rules and regulations not inconsistent with law covering the method of accounting for public funds and property, and funds and property held in trust by the Government or any of its branches. *Provided*, that any officer accountable for public funds or property may require such additional reports or returns from his subordinates or others as he

may deem necessary for his own information and protection.

"The decisions of the auditor shall be *final* and *conclusive* upon the Executive Branches of the Government, except that appeal therefrom may be taken by the party aggrieved or the Head of the Department concerned within one year, in the manner hereinafter prescribed. The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office."

It will be noted from said quoted provisions of the Act of Congress that they were practically taken *in hec verba* from Act No. 1792 of the Taft United States Philippine Commission, and in effect were exactly the same provisions which were enforced during the military government by executive order of May 8, 1899. By reference to section 36 of Act 1792, above quoted, we find that it was brought forward and made a part of section 25 of the said Act of Congress. Said section 25 provides:

"That any person aggrieved by the action or decision of the Auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the Auditor to which exception is taken, with the reason and authorities relied on for reversing such decision.

"If the Governor-General shall confirm the action of the Auditor, he shall so indorse the appeal and transmit it to the Auditor, and the action shall thereupon be final and conclusive. Should the Governor-General fail to sustain the action of the Auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of

War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be *final* and *conclusive.*"

The Philippine Legislature evidently not being satisfied concerning the jurisdiction and power of the Auditor of the Philippine Islands, on March 16, 1923, adopted Act No. 3066 (Vol. 18, Public Laws of the Philippine Islands, 140). That act provided that the authority and power of the Auditor of the Philippine Islands shall extend to and comprehend all matters relating to accounting procedure, including the keeping of the accounts of the Government, the methods of accounting, the examination and inspection of the books, records and papers relating to such accounts, and to audit and settle the accounts of all persons respecting funds or property received or held by them in an accountable capacity, *as well as to the examination and audit of all debts and claims of any sort, due from or owing* to the Government of the Philippine Islands in any of its branches. The department of Customs is one of the branches of the Philippine Government.

From all of the foregoing quotations, commencing with the executive order of May 8, 1899, down to the Act of Congress of August 29, 1916, and the Act of the Philippine Legislature of March 16, 1923 (Act 3066), there have been practically no changes whatever in the *power, duty, authority,* and *finality* and *conclusiveness of the decisions of the Auditor* of the Philippine Islands in the settlement of accounts against the Government.

Rule 44 of the executive order of May 8, 1899, provided that: "The jurisdiction of the Auditor for the Islands over accounts, and all the vouchers pertaining thereto, shall be *exclusive.* His *decision shall be final and conclusive* except that an appeal thereon by the party aggrieved, etc."

Rule 72 of said executive order of May 8, 1899, provided that: *"Any person aggrieved by the action or de-*

cision of the Auditor in the settlement of his accounts or claim by that *officer* may within one year take an appeal in writing to the military governor, etc."

Said rules 44 and 72 were made a part of said Act 90.

Section 6 of Act 1792 provided that the jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, *shall be exclusive* . The decisions of the Auditor shall be *final and conclusive* except that appeal therefrom may be taken by the party aggrieved within one year as provided in section 36.

Section 24 of the Act of Congress of August 29, 1916, among other things provided that the jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and record pertaining thereto *shall be exclusive*. The decisions of the Auditor shall be *final* and *conclusive* upon the executive branches of the Government, except that appeal therefrom may be taken by the party aggrieved within one year, in accordance with section 25 of said Act.

Act 3036, of the Philippine Legislature, as late as March 23, 1923, provided that the authority and power of the Auditor shall extend to and comprehend all matters relating to accounting procedure of the Government and as well as to the *examination* and *audit* of *all debts* and *claims of any sort due from or owing* to the Government of the Philippine Islands in any of its branches.

From the foregoing it is clearly seen that the provisions of the Jones Law are not new in this jurisdiction. They have been in force in the Philippine Islands since the days of the military government. The Jones Law contains no provision not in force since the executive order of May 8, 1899.

From an examination of the admitted facts above quoted, it clearly appears that the petitioner herein is an aggrieved party resulting from the refusal of the Auditor to countersign the warrant issued by the Collector

of Customs for the sum of P159,960.00. If he is an aggrieved party by the action of the Auditor, then the law affords him a remedy by an appeal to the Governor-General. Instead, however, of even attempting to take advantage of the remedy which the law affords him, he at once presented the present petition and asked this Court to substitute its judgment for that of the Auditor, and to compel the Auditor to do what this Court believes he ought to have done in the face of the fact that the law provides that "the decisions of the Auditor are final and conclusive" except when an appeal is taken therefrom.

No rule of law is better established than the one which provides that when "an administrative remedy is afforded" the courts will not take jurisdiction until after the administrative remedies have been exhausted.

First National Bank vs. Weld County, 264 U. S., p. 450 (1924).
McGregor vs. Hogan, 263 U. S. 234.
Farncomb vs. Denver, 252 U. S. 7, 10.
Londoner vs. Denver, 210 U. S. 373.
Price vs. Illinois, 283 U. S. 46.
Petoskey, etc., Co. vs. Petoskey, 162 Mich., 447.
Ward vs. Alsup, 100 Tenn. 619, 746.

The administrative remedies must first be exhausted before resort can be had to the courts. The courts can not assume that if the administrative remedy had been followed, proper relief would *not* have been accorded.

Collins vs. City of Keokuk, 118 Io. 30, 35.
Lo Po vs. H. B. McCoy, 8 P. R. 343.
Jao Igco vs. Shuster, 10 P. R. 448.
U. S. vs. Ju Toy, 198 U. S. 253.
U. S. vs. Sing Tuck, 194 U. S. 161.
U. S. vs. Yu Kiao, 20 P. R. 307.
Lee Jua vs. Coll. of Customs, 32 P. R. 24.
Cooley, on Taxation, 3rd Ed. p. 1393.

Nor will the petitioner be heard to say that there was not adequate time for hearing, in the absence of any effort on his part to obtain one.

> First National Bank vs. Weld County, 264 U. S. 450. .

It is admitted that, in any case where the Auditor is required to act and the law gives him no discretion, he may be required to act by mandamus.

> Work vs. McAlester & Co., 262 U. S. 200.
> Work vs. U. S., Ex rel. Mosier, 261 U. S. 352.

But this is not the case here.

An examination of the authorities relied upon to sustain the majority opinion, in order to ascertain their value in the premises, is important. The first is the case of Fernandez Hermanos vs. Collector of Customs (30 P. R., 50). In that case the Auditor was not a party. No question was presented concerning his authority. The only question discussed was, whether or not certain mechandise used in making certain repairs on the steamship "Islas Filipinas" at the port of Hongkong was admissible free of duty in the Philippine Islands. The Collector of Customs insisted that said merchandise was subject to an import duty. The Steamship Company asserted that the same was not subject to an import duty. That case clearly establishes the fact that the decision of the Collector of Customs is not final upon the question whether or not imported merchandise is subject to an import duty.

The next case cited in the majority opinion, in support thereof, is that of Gutierrez Hermanos vs. Collector of Customs (39 P. R. 876). In that case the Auditor was not a party. No question was raised concerning his authority. The only question discussed and decided was whether or not certain merchandise which had been used in making repairs to the steamship "Magal-

lanes" in a foreign port could be brought into the Philippine Islands without the payment of an import duty. Again the Court held that the decision of the Collector of Customs upon the question whether merchandise should be admitted with or without a duty was not a final decision.

The next case cited to support the conclusion of the majority opinion is that of Concepcion vs. Paredes (42 P. R. 599). We fail to see how that decision can be invoked to support the doctrine that this Court can, by mandamus, compel the Auditor to countersign the warrant in question. The Auditor was not a party and no question was presented touching his authority to do or not to do anything.

The next case cited is that of Hoey vs. Baldwin (1 P. R. 551). We fail to see how that case can in any way support the doctrine contended for in the majority opinion. The Auditor was not a party. No question was presented nor discussed touching his power and authority.

The next case cited in support of the doctrine laid down by the majority opinion is that of Lamb vs. Phipps (22 P. R. 456). We agree that, that case is good authority upon the question of the power, authority, and jurisdiction of the Auditor. In the case this Court discussed at length the powers, the duties and the authority of the Auditor of the Philippine Islands. In the argument in the Lamb case, from the beginning to the end, every word used is contrary to the contention of the majority opinion.

The next case cited is that of Zobel vs. City of Manila (23 O. G., 411). Here again the Auditor was not a party, and, of course, cannot be bound by any dictum contained in the decision in that case. The authority of the Auditor was not in question.

The next case cited in support of the conclusions of the majority opinion is that of the Compania General de

Tabacos de Filipinas vs. French, as Auditor of the Philippine Islands, and C. E. Unson, as Purchasing Agent of the Philippine Islands. That case was an original petition for the writ of mandamus presented in the Supreme Court. Its purpose was to compel the said Insular Purchasing Agent to issue a warrant to pay the freight on certain merchandise carried by the plaintiff in its steamship "VENUS" amounting to P322.93. The petition further demanded that Mr. French, as Auditor, after the Insular Purchasing Agent had issued his warrant, countersign the same. Thus it will be seen that the petitioner was seeking to compel the Insular Purchasing Agent, with the intervention of the Auditor to pay a contract of indebtedness which the petitioner claimed was due to it from the Insular Purchasing Agent.

The facts in that case may be briefly stated: That during the months of January, February, and March, 1919, the Compania General de Tabacos de Filipinas, contracted with the Insular Purchasing Agent for the transportation of goods and merchandise from the port of Manila to sundry ports in the Philippine Islands; that the contract price for the transportation of said goods and merchandise, as freight, amounted to P322.93; that on one of the shipments of goods and merchandise transported from Manila to the municipality of Laoag, of the province of Ilocos Norte, it was discovered that there had been lost in transit a part of two cans of gasoline, which loss was estimated to amount to P5.92, or $2.96; that when the petitioner presented his bill for freight for the sum of P322.93, the Insular Purchasing Agent insisted that the amount of the loss of the gasoline should be deducted: that the petitoner objected to said deduction, insisting that it was not responsible for said loss; that later and after some controversy Mr. C. E. Unson, Purchasing Agent of the Bureau of Supply, issued his warrant, payable to the petitioner (the Compania General de Tabacos de Filipinas) on the 27th day

of April, 1919, for the sum of P317.01, being the amount of said freight, less the P5.92. That warrant was countersigned by C. H. French, Insular Auditor. The petitioner herein refused to accept said warrant even though it was countersigned by the Auditor, Mr. French, unless the P5.92 was included. Later, and on the 9th day of May, 1919, a petition was presented demanding that the Supreme Court issue a writ of mandamus to compel the Insular Purchasing Agent to issue his warrant for the full amount of said freight, including the disputed claim of P5.92, and that when said warrant was once issued, that the Insular Auditor be required to countersign the same.

The respondents demurred to said petition upon the following grounds:

"1. That petition fails to show that the decision of the Auditor of the Philippine Islands, which is final and conclusive under the terms of the Organic Act of Government, has been appealed from, as provided in sections 24 and 25 of an Act of Congress entitled, 'An Act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those Islands', approved August 29, 1916.

"2. That the petition fails to show that the petitioner has taken an appeal from the decision of the Auditor of the Philippine Islands, as required by law, and as precisely laid down and governed by sections 652, 654, 655 and 656 of the Administrative Code.

"3. That the petition affirmatively shows that the said petitioner has not pursued the remedy provided by law for the redress of the alleged injury to it, growing out of the said decision of the Auditor of the Philippine Islands, and more precisely referred to in the said petition.

"4. That the said petition contains no averment that the petitioner has exhausted the remedies provided by

law for the relief which it now seeks by said petition, and that such petition, for want of such averment, is fatally defective."

Upon a consideration of the petition and the demurrer, it was ordered that the writ of mandamus issue in accordance with the prayer of the petition unless the respondent answer the petition within the period of five days. The respondent failed to answer said petition of the Supreme Court on the 27th day of May, 1919, ordered that a writ of mandamus issue, directing the respondents, the Insular Purchasing Agent and the Insular Auditor, to issue, countersign, and deliver in conformity with the customary usage, the proper treasury warrant, payable to the petitioner for the sum of P322.93, in satisfaction of the credit claimed for transportation services referred to in the complaint, without deduction or abatement; *it being understood, however, that this order is without prejudice to the right of the Government to institute an independent action to recover the sum of* P5.92, *which is claimed by the Government to be due from the petitioner.*

By said final order it will be seen that the Supreme Court of the Philippine Islands first ordered the respondents to pay to the petitioner a *certain amount due under a contract*, which *amount was disputed*, and then reserved to the respondents the right to litigate the question concerning which the original difference of opinion arose. In other words, the Supreme Court, by the writ of mandamus, compelled the Auditor and the Insular Purchasing Agent to pay the full amount alleged to be due under *a contract while said amount was in dispute*, but *reserved to the Government the right to bring an independent action for the purpose of settling the question in dispute* between the parties originally.

We are unable to understand how the Supreme Court ever gave its consent to the issuance of mandamus to compel the payment of a disputed claim arising under a

contract. If we understand the scope and purpose of the writ of mandamus and the jurisprudence relating thereto, there is no *rule* better established than the one, that such a remedy is not the proper remedy for the *enforcement of contract rights* of a private or personal nature, or debts, and *obligations which rest wholly upon contract* and which involve no question of trust or official duty, cannot be enforced by mandamus. *A contrary doctrine would necessarily have the effect of substituting the writ of mandamus in place of a decree for specific performance* and the courts have, therefore, steadily refused to extend the jurisdiction into the domain of contract rights.

State vs. Zanesville, etc. Co., 16 Ohio State 308.
State vs. County Court, 39 Mo. 375.
Parrott vs. City, etc., 44 Conn. 180.
State vs. Einstein, 46 N. J. Law, 479.
State vs. Trustees, etc., 114 Indiana 389.
High on Extraordinary Legal Remedies (3rd Ed.) sec. 25.
Portman vs. Fish Commissioners, 50 Mich. 258.
Board of Education vs. Runnels, 57 Mich. 46.
People vs.. Thompson, 99 N. Y. 641.

We deem it unnecessary to refer to the statutory authorities relied upon in the majority opinion, for the reason that they have been discussed above. In that discussion it has been demonstrated that none of the statutory authorities cited justifies the conclusions of the majority opinion.

In our judgment, the demurrer should have been sustained, and the writ of mandamus denied.

(Sgd.) E. FINLEY JOHNSON
(Sgd.) JAMES A. OSTRAND

On September 22, 1925, the Clerk of the Supreme Court of the Philippine Islands sent to the respondent the following notification:

(CAPTION AND TITLE OMITTED)

Sir:

You are hereby notified that on the 21st day of September, 1925, a decision rendered by this Court in the above-entitled cause was filed in this office, whereby it is declared that the petitioner is entitled to the writ as prayed for in the petition, without costs to either party. Ten days after the publication of this decision, final judgment will be entered and five days thereafter the records will be remanded to the court below.

For the Clerk,

(Sgd.) V. ALBERT,
Clerk.

On September 24, 1925, the respondent filed the following motion:

(CAPTION AND TITLE OMITTED)

MOTION FOR RECONSIDEERATION

Now comes the respondent Insular Auditor in the above-entitled case and moves for a reconsideration of the decision rendered by this Honorable Court on September 21, 1925, on the ground that said decision is contrary to law and the facts admitted by the pleadings.

(Sgd.) BEN F. WRIGHT,
Insular Auditor—Respondent.

Manila, P. I.
September 23, 1925.

On September 28, 1925, the Supreme Court issued the following resolution:

> "Upon consideration of the motion of the respondent filed in case R. G. No. 23601, Ynchausti & Company vs. Ben F. Wright etc., praying that the decision heretofore rendered therein be reconsidered, MOTION DENIED, Mr. Justice Ostrand dissented."

On September 30, 1925, the respondent filed the following exception and notice of intention to apply for a writ of certiorari to the Supreme Court of the United States:

(CAPTION AND TITLE OMITTED)

Comes now the respondent Auditor for the Philippine Islands and excepts to the decision of this Court in denying his motion for a reconsideration in the above entitled action, and also excepts to the final judgment entered herein.

Notice is hereby given that the respondent intends to petition the Supreme Court of the United States for a writ of certiorari for the review of the decision and judgment of this Court in view of the fact that it involves an interpretation and application of the laws of Congress of the United States.

The said respondent respectfully requests a stay of the judgment of this Court during the pendency of the application for the writ of certiorari and of the proceedings in the Supreme Court of the United States.

Manila, P. I., September 30, 1925.

(Sgd.) BEN F. WRIGHT,
Auditor for the Philippine Islands, Respondent.

On October 6, 1925, the following final judgment was entered:

YNCHAUSTI & CO.,
Petitioner,
vs.
BEN F. WRIGHT, *as Auditor of the Philippine Islands Respondent.*

JUDGMENT
October 6, 1925
File No. 23601

The Court having regularly acquired jurisdiction over the above entitled cause, submitted by both parties for decision after consideration thereof by the Court upon

record, its decision and order for judgment having been filed on the 21st day of September, 1925;

By virtue thereof, it is adjudged and decreed that the respondent, BEN F. WRIGHT, as Auditor for the Philippine Islands, be and he is hereby required and commanded to countersign for payment by the Insular Treasurer warrant No. 210175 drawn by the Insular Collection of Customs under date of November 26, 1924, for the payment of petitioner, Ynchausti & Co., of the sum of P159,960.00 covering the refund of protested import duties paid under entry No. 31654-A, Protest No. 14061.

Neither party to recover costs.

(Sgd.) V. ALBERT,
Clerk, Supreme Court, P. I.

(SEAL)

Certified correct:

V. ALBERT,
Clerk, Supreme Court, P. I.

On October 28, 1925, the Supreme Court, issued the following resolution:

"Upon consideration of the motion of the respondent filed in case R. G. No. 23601, Ynchausti & Company vs. Ben F. Wright, as Auditor for the Philippine Islands, excepting to the decision of this Court in denying his motion for reconsideration as well as to the final judgment; giving notice of his intention to petition the Supreme Court of the United States for a writ of certiorari for the review of the decision and judgment of this Court, and praying for a stay of the judgment of this Court during the pendency of the application for the writ of certiorari and of the proceedings in the Supreme Court of the United States, and after considering the petitioner's objection thereto unless security be given in accordance with the provisions of section 8(d) of the Act of Congress of February 13, 1925, it is ordered that the EXCEPTION be NOTED,

and a stay of the mittimus or of the execution of the judgment heretofore entered therein is HEREBY GRANTED."

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA

PHILIPPINE ISLANDS

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing one hundred forty-one (141) type-written pages (foregoing 134 printed pages) contain a true and correct transcript of the record of the case entitled Ynchausti & Co., petitioner, versus Ben F. Wright, as Auditor for the Philippine Islands, respondent, concerning petition for mandamus, bearing No. 23601 of the General Register of this Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands this 30th day of October A. D., nineteen hundred and twenty-five.

(SEAL)

V. ALBERT,
Clerk, Supreme Court of the Philippine Islands.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the Supreme Court of the Philippine Islands is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MAR 16 1926
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. [redacted]316

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

vs.

YNCHAUSTI AND COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. ——

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

vs.

YNCHAUSTI AND COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

To The Honorable,
The Chief Justice and Associate Justice of the
Supreme Court of the United States:

Petitioner Ben F. Wright, Auditor for the Philippine Islands, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of the Philippine Islands in the case entitled Ynchausti & Company, Petitioner (Respondent here) vs. Ben F. Wright, as Auditor for the Philippine Islands, Respondent (Petitioner here), No. 23601.

I

THE CASE

This proceeding involves the jurisdiction and authority of the Auditor for the Philippine Islands under Sections

24 and 25 of the Jones Act of August 29, 1916, Ch. 416, (39 Stat. 545, 553, 554), hereinafter referred to as the Organic Act, to audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government; to settle and adjust all accounts whatever for and against the Philippine Government; to countersign all warrants for the drawing of public money from the Treasury of the Philippine Government; and the manner or method of review of the decisions and rulings of the said Auditor. It also involves the jurisdiction of the Insular Collector of Customs as provided in Section 1301 of the Administrative Code for Philippine Islands, 1917, to audit, settle and allow claims for refund of custom duties and the jurisdiction and authority under Section 26 of the Organic Act of the Supreme Court of the Philippine Islands to grant mandamus against the Auditor for the Philippine Islands requiring the said Auditor to allow a claim for refund of custom duties and to countersign a warrant chargeable to a general appropriation in the Treasury for the Philippine Government in payment of such claim.

Petitioner is commanded by the Supreme Court of the Philippine Islands to allow the claim of respondent (petitioner below) for refund of custom duties collected by the Insular Collector of Customs under paragraphs 200 and 348 of the Philippine Tariff Act of August 5, 1909, (36 Stat. 130, 157-159, 172-173) as amended by Act No. 2872 of the Philippine Legislature approved November 24, 1919, and which were deposited into the general fund of the Philippine Treasury pursuant to Section 610, Administrative Code, 1917, and Section 14, Chapter III, Act No. 2935. Petitioner is also commanded to countersign a warrant chargeable to a general and indefinite appropriation made by Act No. 357 of the Philippine Commission for refund of custom duties erroneously or illegally collected (R. 133).

The Supreme Court of the Philippine Islands held that the decision of the Insular Collector of Customs allowing

the claim for a refund of custom duties was a correct decision and that the jurisdiction and authority of petitoner with respect to allowance of claims approved by the Insular Collector of Customs for refund of custom duties was ministerial and that a writ of mandamus would issue requiring petitioner to countersign a warrant on the Treasury for the Philippine Government in payment of such claim.

II

THE PROCEEDINGS

The proceeding was instituted in the Supreme Court of the Philippine Islands by respondent, Ynchausti and Company. Its petition alleged it was the owner of the Steamship *Venus*, used in the coastwide trade of the Philippine Islands; that it caused certain repairs and reconstruction work to be done in Hongkong, China; that adequate facilities for doing such work were not available in the Philippine Islands; that upon return of the vessel to Philippine waters on or about October 20, 1924, the Insular Collector of Customs at Manila levied and collected P 159,960 duties; that the duties were paid under protest, claiming that such repairs and work were exempt from the payment of custom duties under paragraph 200, Section 8, and paragraph 348, Section 11, of the Philippine Tariff Act of 1909 as amended by Act No. 2872 of the Philippine Legislature; that the Insular collector of Customs subsequently sustained the protest and ordered refund of the duties collected; and that the Auditor for the Philippine Islands refused to countersign a warrant for refund of the duties (R. 2-5).

The answer of the petitioner (respondent below) among other things alleged that the custom duties originally collected by the Insular Collector of Customs had been covered into the Insular Treasury and had become a part of the general unappropriated funds of the Insular

Government pursuant to Section 14, Chapter III, of Act No. 2935 of the Philippine Legislature; that the petitioner was invested with jurisdiction and authority to settle and adjust all claims for refund of custom duties chargeable to general appropriations for refund of duties erroneously or illegally collected; that his actions in the premises are and were discretionary and not ministerial; that the court had no jurisdiction to review his discretionary actions in the premises; and that the respondent (petitioner below) had a plain, speedy and adequate remedy in the ordinary course of law (R. 12-17).

The respondent (petitioner below) demurred to the answer on the ground that it did not state facts sufficient to constitute a defense (R. 17-18). The Supreme Court for the Philippine Islands, Johnson and Ostrand, Justices dissenting (R. 85-130), sustained the demurrer and ordered issue of the writ as prayed (R. 61-85).

III

THE RESULT OF THE JUDGMENT BELOW

As a result, and even though neither the United States nor the Government of the Philippine Islands has consented to the latter being sued in the manner herein for refund of custom duties or on any other account, this proceeding, in the language of the Court in *Brashear* v. *Mason*, 6 Howard, 93, at page 102, "by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals." A further result is that the Supreme Court of the Philippine Islands has assumed jurisdiction not conferred on it by the laws of the United States to control by mandamus the discretionary action of officials of said Island appointed by and responsible to the United States Government.

IV

QUESTIONS PRESENTED

(1) Whether the Auditor for the Philippine Islands may be controlled and directed by mandamus of the Supreme Court of the Philippine Islands in the audit and settlement of claims and accounts against the Government of the Philippine Islands chargeable to appropriations made in general terms for refund of custom duties alleged to have been erroneously or illegally collected.

(2) Whether the Auditor for the Philippine Islands performs and exercises a mere ministerial duty controllable by mandamus in the audit and settlement of claims and accounts for refund of custom duties approved by the Insular Collector of Customs and in the countersignature of warrants on the Treasury for the Philippine Government for the payment of refunds of custom duties or whether such duties of the Auditor are discretionary.

(3) Whether the laws of the United States confer exclusive jurisdiction and authority on the Insular Collector of Customs for the Philippine Islands independently of the Auditor for the Philippine Islands to audit, settle, and allow claims for refund of custom duties and if not, whether the construction of the court below of the laws of the Legislature for the Philippine Islands that all matters of discretion with respect to such claims are confined to the Insular Collector of Customs is the correct construction of said laws and if so, whether such laws are valid.

(4) Whether the sole and exclusive remedy of a claimant for refund of custom duties denied by the Auditor for the Philippine Islands is not limited to an appeal to the Governor General and to the Secretary of War or to the Philippine Legislature.

(5) Whether the Governor General for the Philippine Islands and the Secretary of War as the superior officers of the Auditor for the Philippine Islands are not neces-

sary and indispensable parties in any proceeding by mandamus against the said Auditor.

(6) Whether the Government of the Philippine Islands is not the real party in interest and a necessary and indispensable party in any proceeding by mandamus against the Auditor for the Philippine Islands to require the said Auditor to allow a claim for refund of custom duties and to countersign a warrant on the Treasury for the Philippine Government for payment of said claim.

V

REASONS FOR GRANTING THE WRIT

(1) The general importance to the relation of the United States with the Government for the Philippine Islands of the question whether the Supreme Court of the Philippine Islands has jurisdiction to require the Auditor for said Islands appointed by, and holding office at the pleasure of the President of the United States to allow claims against the Philippine Government and to countersign warrants chargeable to appropriations in general terms in payment of said claims.

(2) The general importance to the relation of the United States with the Government for the Philippine Islands of the question whether the decisions of the Auditor for the Philippine Islands in the audit and settlement of "all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government" are "final and conclusive upon the executive branches of the government" as specified in Section 24 of the Organic Act, subject to the right of appeal as specified in Section 25 of said act, or whether such decisions and jurisdiction in respect to the allowance of claims for refund of custom duties and in the countersignature of warrants in payment of such claims are in subordination to the decisions and jurisdiction of the Insular Collector of Customs as held by the court below

in construing Section 1301 of the Philippine Administrative Code, 1917.

(3) The disregard of the applicable decisions of the Supreme Court of the United States in *Brashear* v. *Mason*, (6 Howard 92), *Decatur* v. *Paulding*, (14 Peters 497), and *United States* v. *Guthrie*, (17 Howard 294), that where consent has not been given to sue the Government, public moneys in the Treasury to the credit of general appropriations may not be withdrawn therefrom by extraordinary judicial processes directed against officers of the Government, the situation with respect to suits against the Government for the Philippine Islands being the same as that existing prior to the creation of the Court of Claims in 1855, for suits against the United States.

(4) The disregard of the applicable decisions of the Supreme Court of the United States in *United States* v. *Lynch*, (137 U. S. 280), that even after the Government had consented to be sued, the Auditors of the United States and the Comptroller of the Treasury may not be controlled by extraordinary judicial processes in the audit and settlement of claims and accounts and in their statutory duty to countersign warrants when lawfully chargeable to general appropriations in the Treasury in payment of claims, Section 24 of the Organic Act providing that the Auditor for the Philippine Islands shall, except as thereinafter provided, have "like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury." The exception referred to is not a limitation of the authority of the Auditor.

(5) The disregard of the applicable decision of the Supreme Court of the United States in *Webster* v. *Fall, et al.*, (266 U. S. 507), that in any proceeding by extraordinary judicial process against a public officer, the superior of such officer is a necessary and indispensable party. By Section 24 of the Organic Act the Auditor for the Philippine Islands is "under the general supervision

of the Governor General" and his decisions are reviewable by both the Governor General and the Secretary of War.

(6) The disregard of the applicable decision of the Supreme Court of the United States in *Work* v. *United States on the Relation of Logan S. Rives* (267 U. S. 175), that extraordinary judicial process can not be invoked to operate as a writ of error to review the discretionary acts of public officers.

(7) The disregard of the applicable decisions of the Supreme Court of the United States in *Wells* v. *Roper*, (246 U. S. 335); *Louisiana* v. *McAdoo*, (234 U. S. 627), and *Oregon* v. *Hitchcock*, (202 U. S. 60), that a proceeding against a public officer concerning public money or property is in essence a proceeding against the Government which is a necessary and indispensable party, jurisdiction being determined by the real and not by the nominal parties in interest.

WHEREFORE, it is respectfully submitted that the writ of certiorari should issue as prayed.

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

THE UNITED STATES OF AMERICA }
DISTRICT OF COLUMBIA } ss:

L. H. Hedrick, being duly sworn, says that he is one of the attorneys for the petitioner herein and that he has carefully read and examined the foregoing petition, that the facts therein stated are true to the best of his knowledge, information and belief, and, in his opinion, the said petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

L. H. HEDRICK.

Subscribed and sworn to before me this 15th day of March, 1926.

N. CURTIS LAMMOND,
Notary Public.

(SEAL) My commission expires July 16, 1929.

BRIEF IN SUPPORT OF THE PETITION

The proceedings, opinions and judgment of the Supreme Court of the Philippine Islands entered, October 6, 1925, have not yet been reported. They are, however, set forth in the printed transcript of record filed in this case (R. 1-134).

JURISDICTION

The petitioner applies to this Court for a writ of certiorari to the Supreme Court of the Philippine Islands pursuant to authority granted by Sections 7 and 8 of the Act approved February 13, 1925, (43 Stat. 940).

The issuance of the writ, followed by a review by this Honorable Court of the record in the court below, is not sought in the hope this Court may find that the respondent is not entitled to a refund or that errors were committed in the decision of the lower court on the merits of the respondent's claim. For although the lower court concerned itself with and passed upon the merits of respondent's claim, this matter properly was not before it on any theory of the case.

The major question in the case is whether the duties of the Auditor of the Philippine Islands in connection with this claim were ministerial or discretionary. If ministerial the court had jurisdiction and should have issued the writ of mandamus, not because the court decided the claim was a just claim, but because the Insular Collector of Customs had decided it was a just claim. If discretionary the court should have denied the writ, regardless of their views on the merits of the claim, for

mandamus will not lie to compel the doing of a discretionary act in a certain way.

I

THE DETERMINATION OF THE AVAILABILITY OF A GENERAL APPROPRIATION FOR THE PAYMENT OF ANY CLAIM PAYABLE FROM A GENERAL APPROPRIATION IS A QUASI-JUDICIAL OR DISCRETIONARY MATTER WITHIN THE EXCLUSIVE JURISDICTION OF THE AUDITOR, SUBJECT ONLY TO THE ADMINISTRATIVE APPEALS PROVIDED BY LAW. FOR THE COURTS TO ATTEMPT TO CHANGE OR DISTURB THIS DETERMINATION BY MANDAMUS IS CONTRARY TO THE RULE LAID DOWN BY A LONG LINE OF DECISIONS OF THIS COURT, AND WILL DISRUPT THE GOVERNMENT ESTABLISHED FOR THE PHILIPPINE ISLANDS BY THE LAWS OF THE UNITED STATES.

Both Article I, Section 9, of the Constitution of the United States and Section 3 of the Act of August 29, 1916, (39 Stat. 546), (hereinafter referred to as the Organic Act) establishing an autonomous government for the Philippine Islands provide that no money shall be drawn from either Treasury except in pursuance of an appropriation by law. This Court pointed out in *Brashear* v. *Mason*, (6 Howard 93), at pages 100 and 101, in a mandamus proceeding against the Secretary of the Navy, to secure a payment alleged to be chargeable to a general appropriation that:

> We are also of opinion, that if the plaintiff had made out a title to his pay as an officer of the United States Navy, a mandamus would not lie in the court below to enforce the payment.
>
> The Constitution provides, that no money

shall be drawn from the treasury but in consequence of appropriations made by law. (Art. I, Sec. 9.) And it is declared by act of Congress (3 Statutes at Large, p. 689, Sec. 3), [now Section 11 of the Act of July 31, 1894, 28 Stat. 209] that all moneys appropriated for the use of the war and navy departments shall be drawn from the treasury by warrants of the Secretary of the treasury, upon requisition of the Secretaries of these deparements, countersigned by the second comptroller.

And by the act of 1817 (3 Statutes at Large, p. 367, Secs. 8, 9), [now Section 11 of the Act of July 31, 1894, 28 Stat. 209], it is made the duty of the comptroller to countersign the warrants only in cases when they shall be warranted by law. * * *

Formerly the moneys appropriated for the war and navy departments were placed in the treasury to the credit of the respective secretaries. That practice has been changed, and all the moneys in the treasury are in to the credit or in the custody of the treasurers, and can be drawn out, as we have seen, only on the warrant of the Secretary of the Treasury countersigned by the comptroller.

Section 24 of the Organic Act provides that the Auditor for the Philippine Islands "shall have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States" except that there is an administrative appeal from his decisions to the Governor General and the Secretary of War. Ex-President and now Chief Justice Taft said at page 81 of his book on *Our Chief Magistrate and His Powers*, with respect to the discretion of the Comptroller of the Treasury under the Dockery Act of July 31, 1894, (28 Stat. 205, 211) that:

Then consider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury (now

> the Comptroller General). It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his claim into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the Government have no appeal, and his decision is final.

and at pages 125, 126 that:

> Congress may repose discretion in appointees of the President, which the President may not himself control. The instance I have already given is one of these, in which the Comptroller of the Treasury has independent quasi-judicial authority to pass on the question of what warrants are authorized by appropriation acts to be drawn by him on the funds of the Treasury. The President can appoint him and remove him, but may not control his construction of appropriation acts and his signing, or withholding his signature from warrants in accordance with that construction.

The United States Court of Claims was not established until 1855, and the *Brashear case* as well as the cases of *Decatur v. Paulding* (14 Peters 497), *United States* v. *Guthrie* (17 Howard 94), and *Reeside* v. *Walker* (11 Howard 272), were decided prior to that date and represent attempts to secure public money from appropriations in the Treasury.

Neither the United States nor the Philippine Government has authorized suits of this kind, nor has the legis-

lature for the Philippine Government appropriated a specific sum for the payment of this particular claim, and we respectfully submit that the Supreme Court of the Philippine Islands has no more jurisdiction to issue mandamus requiring general appropriations to be paid out of the Philippine Treasury than has the courts of the United States. The remedy of an aggrieved claimant in a case of this nature is to prosecute an appeal to the Governor General and Secretary of War, as provided in Section 24 of the Organic Act, or to apply to the legislature of the Philippine Islands for a specific appropriation to pay the claim.

It long has been settled that extraordinary judicial process can not be used to control the acts of the accounting officers of the United States in the allowance and payment of claims from general appropriations in the Treasury. *United States* v. *Lynch* (137 U. S. 280). Even since the United States has consented to be sued on certain limited causes of action, the courts have been given no jurisdiction to determine the availability of general appropriations to pay claims and their judgments against the United States must be specifically reported to Congress for an appropriation with which to pay the same. Acts of September 30, 1890 (26 Stat. 537), and February 18, 1904 (32 Stat. 41).

This procedure of imposing exclusive jurisdiction in the Comptrollers of the United States Treasury to determine the availability of general appropriations in the United States Treasury and the countersignature of warrants to secure such money therefrom, with the right of appeal only to administrative officers or to the Congress, has obtained since the Ordinances of September 26, 1778, of the Continental Congress (Vol. XII, Journals, Continental Congress, pp. 956-961). See Acts of September 2, 1789 (1 Stat. 65), March 3, 1817 (3 Stat. 366), July 31, 1894 (28 Stat. 205-211), and June 10, 1921 (42 Stat. 24, 27). *Prior to the establishment of the Court of Claims in 1855, the decisions of the accounting officers*

were conclusive as to the merits of a claim, subject only to an appeal to certain specified administrative officers or to the Congress. Since that date their decisions are conclusive on the executive branches of the Government in all cases (Act of March 30, 1868, 15 Stat. 54, Section 191, Revised Statutes, Section 305 of the Act of June 10, 1921, 42 Stat. 24), subject only in certain specified cases to administrative appeal, and are conclusive upon the courts with respect to the availability of general appropriations in the Treasury; that is, as to the method of payment, for even after judgment by a court, the money to pay same must be specifically appropriated. Such decisions are reviewable by the courts only in the cases, and in the courts, and in the manner provided by statute. Mandamus is not the method authorized in this class of cases under the laws applicable to the Philippine Islands.

Since the Auditor for the Philippine Islands with respect to general appropriations of the Philippine Government has even greater jurisdiction than the accounting officers of the United States have with respect to general appropriations in the United States Treasury, and since no such jurisdiction as has been assumed in this case ever has been conferred upon the courts of the Philippine Islands over the subject-matter of claims against the Philippine Government, nor (as will be hereinafter shown) to control by mandamus the Auditor of the Philippine Government in the performance of his discretionary duties in the settlement of claims and the countersignature of warrants in payment thereof, it would appear necessarily to follow that the judgment below is not only erroneous and in conflict with a long line of decisions of this Court, but if permited to stand will seriously disrupt the system of Government for the said Islands as established by the laws of the United States.

II

THE DUTIES OF THE AUDITOR FOR THE PHILIPPINE ISLANDS IN THE SETTLEMENT OF CLAIMS OF A CLASS PAYABLE FROM GENERAL APPROPRIATIONS AND THE COUNTERSIGNING OF WARRANTS THEREFOR ARE QUASI-JUDICIAL OR DISCRETIONARY. THE ATTEMPT OF THE COURT BELOW TO COMPEL THE PERFORMANCE OF THESE DUTIES IN A PARTICULAR MANNER IS IN DISREGARD OF AND CONTRARY TO THE DECISIONS OF THIS COURT.

The duties of the Auditor for the Philippine Islands to "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government," and "to audit, in accordance with laws and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the Government," and "to communicate directly with any person having claims before him for settlement" and to "*perform a like duty with respect to all government branches*" as provided in Section 24 of the Organic Act, are discretionary duties and apply to the Insular Collector of Customs equally with all other branches of the Government. Such duties are more discretionary than those of the Commissioner of Patents which this Court held in *Butterworth* v. *Hoe*, (112 U. S. 67), to be discretionary and not subject to control by judicial process; and more discretionary than the duties of the Secretary of the Interior, considered by this Court in *Work* v. *United States, Ex Rel Rives* (267 U. S. 175), for the accounting officers of the United States are required under Section 236 of the Revised Statutes as amended by Section 305, the act of June 10, 1921 (42 Stat. 21), to audit and settle the account after the Secretary of the Interior had made an allowance, and to determine the

availability of appropriations to pay said account. Furthermore, it has been held in *Brashear* v. *Mason,* and *Decatur* v. *Paulding, supra,* that even the duties of administrative officers with respect to determining a claim chargeable to general appropriations were discretionary and not subject to control by judicial process.

The Court stated in *United States* v. *Lamont* (155 U. S. 303), at page 308, that:

> The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made. Thus in the case of *Ex parte Rowland,* 104 U. S. 604, 612, this court speaking through Mr. Chief Justice Waite, said: "It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one."
>
> Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act, *Commonwealth* v. *Boutwell,* 13 Wall. 526, but it must *require* the act to be done. "A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do," *Reeside* v. *Walker,* 11 How. 272; see also *Secretary* v. *McGarrahan,* 9 Wall. 298; and the duty must be "clear and indisputable." *Knox County Commissioners* v. *Aspinwall,* 24 How. 376.

Moreover, Section 5 of the Administrative Code for the Philippine Islands, 1917, expressly provides that:

> The exercise of the permissive powers of all executive or administrative officers and bodies is based upon discretion, and when such officer or body is given authority to do any act but not required to do such act, the doing of the same shall be dependent on a sound descretion to be exercised for the good of the service and benefit of the public, whether so expressed in the statute giving the authority or not.

Even were the question an original one this law is conclusive that the Auditor for the Philippine Islands performs discretionary duties in the settlement of claims for refund of custom duties and in the countersignature of warrants chargeable to general appropriations for the payment of such claims. Under the unanimous decisions of this Court commencing with *Marbury* v. *Madison* (1 Cranch 137), mandamus can not be issued to control him in such discretionary action regardless of whether he erred therein. As said in *Riverside Oil Company* v. *Hitchcock* (190 U. S. 316):

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law (and the facts) was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction.

So here, the acts of Congress establishing the office of Auditor for the Philippine Islands defined the duties of such office in a manner to leave no other reasonable conclusion than that they are discretionary in character, and the legislature of the Philippine Government has made express provision to like effect. We, therefore, respectfully submit that the judgment of the court below is contrary to a long line of decisions of this court with relation to this matter and should be reviewed by this court.

III.

THE CASE OF SMITH V. JACKSON (246 U. S. 338) DISTINGUISHED.

The court below placed great weight on *Smith* v. *Jackson*, (246 U. S. 338), wherein was sustained the action of the United States Court for the Canal Zone in issuing a writ of mandamus to the Auditor of the Panama

Canal Zone. There the Congress had appropriated in the Act of March 3, 1915 (38 Stat. 883), for "salaries of district judge $6,000," etc. It was held in that case that the payment of the salary as appropriated by Congress in a fixed and definite sum to a definite person was a ministerial duty. That is not the situation here for there was no fixed and definite sum appropriated by the Legislature of the Philippine Islands as a refund to the respondent (petitioner below) of custom duties. The question whether appropriations made in general terms to make refund of custom duties erroneously or illegally collected and not considered by the Court of First Instance were available to make refunds to respondent depended on the law and facts of respondent's claim and was exclusively committed to the sound discretion of the Auditor for the Philippine Islands.

A full statement of the facts in the *Smith* v. *Jackson case* is contained in 241 Fed. 747. The attention of the Court is particularly invited to the sections of the Code for the Canal Zone, quoted on page 752 of said volume, as to the authority of the Court for the Canal Zone to issue writs of mandamus. This authority was exceedingly more comprehensive than that conferred on United States Courts generally. See *Barber* v. *Hetfield*, 4 Fed. (2nd) 245, where this was pointed out. Also the Auditor for the Panama Canal Zone was not an accounting officer of the Treasury within the meaning of the Ordinance of 1778, act September 2, 1789, March 3, 1817, July 31, 1894, *supra*, with whose duties those of the Auditor for the Philippine Islands are assimilated by Section 24 of the Organic Act. In fact, the duties of the Auditor for the Panama Canal Zone are analagous to those of the Insular Collector of Customs in this case. He is an administrative examiner of accounts such as is common to all of the departments and establishments of the Government and the claims and accounts examined by him were required by the act of October 22, 1913, (36 Stat. 209) to be thereafter settled and adjusted by the Auditor

for the War Department, one of the former auditors of the Treasury. Not so, as to the settlements of the Auditor for the Philippine Islands. They are final unless reversed on administrative appeal as provided in Section 24 of the Organic Act.

There has been no case in the Supreme Court of the United States since the foundation of the Government (and the offices of auditors and comptrollers of the United States have been in existence throughout that period) where said Court has sustained the issuance of mandamus or injunction against them. The fact that until 1855 there existed no remedy whatever at law against the United States, was not sufficient to permit such action and as heretofore shown, the situation in the present case with respect to suits against the Philippine Government is the same as that prior to 1855 with respect to suits against the United States.

The reason for the rule is clear. The Constitution of the United States confers exclusive control over public money to the Congress and as pointed out by Ex-President Taft, in his book on Our Chief Magistrate and His Powers, the Congress has committed exclusive authority and jurisdiction (unless otherwise specifically provided by law) to the comptrollers to determine the availability of general appropriations to pay claims. The Congress has also established courts of inferior jurisdiction and conferred upon them authority to hear and determine claims against the United States and has provided expressly how the judgments may be paid. There is no overlapping of the jurisdiction of such courts and the comptrollers and both are subordinate to the Congress with respect to public money. The same situation exists with respect to the Auditor for the Philippine Islands and the Supreme Court of said Islands, with the difference that (except where an appeal from the Insular Collector of Customs to the Court of First Instance as provided by law has been perfected) said courts have had no jurisdiction conferred on them to hear and determine

such claims against the Philippine Government or to determine the availability of general appropriations to pay such claims. Said jurisdiction is exclusively that of the Auditor subject to appeal as provided in Section 24 of the Organic Act to the Governor General and to the Secretary of War, or to the Legislature of the Philippine Islands in accordance with the principles stated in *Reeside* v. *Walker, Brashear* v. *Mason, Decatur* v. *Paulding, supra.*

IV

THE SUPREME COURT OF THE PHILIPPINE ISLANDS HAS NO GREATER JURISDICTION IN MANDAMUS ACTIONS THAN HAVE THE COURTS OF THE UNITED STATES.

Section 9 of the Act of July 1, 1902 (32 Stat. 691, 695), to temporarily provide for the government of the Philippine Islands, provided that "the Supreme Court and the courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said Islands, subject to the power of said government to change the practice and method of procedure." Section 26 of the Organic Act provides that the Supreme Court of the Philippine Islands "shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by law."

The Spooner Amendment of March 2, 1901 (31 Stat. 910) provided that "All military, civil and judicial powers necessary to govern the Philippine Islands" shall until otherwise provided by Congress, "be vested in such persons and shall be exercised in such manner as the President of the United States shall direct." Section 515 of Laws of United States Philippine Commission (House Document No. 11, 57th Congress, 1st Session, 1901-1902), provides that:

> * * * The Supreme Court shall have concurrent jurisdiction with the Courts of First Instance in all cases where an inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully excluded by such inferior tribunal, corporation, board, or person, and also shall have original jurisdiction over Courts of First Instance and Judges thereof wherever said Court or Judge unlawfully neglects the performance of a duty which the law specifically or specially enjoins as a duty imposed upon such Court or Judge. The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in Sections 222, 223, 224, and 225 of this Code.

The foregoing defines the jurisdiction of the Supreme Court of the Philippine Islands, but confers no greater jurisdiction for the issuance of writs of mandamus than has been conferred upon courts of the United States, and it needs no argument to demonstrate that the latter have never had jurisdiction for the issuance of writs of mandamus to require the performance of discretionary acts in a particular manner.

V

THE JURISDICTION OF THE INSULAR COLLECTOR OF CUSTOMS TO SETTLE CLAIMS FOR REFUND OF CUSTOMS DUTIES IS SUBORDINATE TO THAT OF THE AUDITOR FOR THE PHILIPPINE ISLANDS. THE DECISION OF THE COURT BELOW TO THE CONTRARY IS AN ERRONEOUS CONSTRUCTION OF A FEDERAL LAW INVOLVING A QUESTION OF

SUBSTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Section 24 of the Organic Act expressly provides that the Auditor of the Philippine Islands "shall examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government," and "audit, in accordance with laws and administrative regulations, all expenditures of funds," and that the Auditor is authorized "to communicate directly with any person having claims before him for settlement," the last clause showing clearly that his "audit" of expenditures includes "settlement" of claims.

That the jurisdiction of the Auditor in the performance of the foregoing duties applies to the actions of the Insular Collector of Customs clearly is shown by the further provision of the foregoing section that the Auditor "shall perform a like duty with respect to all government branches." That the jurisdiction of the Insular Collector of Customs (considered by this Court in *Gsell* v. *Insular Customs Collector* (239 U. S. 93), to allow claims for refund of custom duties payable from general appropriations in the Philippine Treasury is subordinate to that of the Auditor for the Philippine Islands is shown by the further provision of said foregoing section that the decision of the Auditor "shall be final and conclusive on the executive branches of the Government."

Section 614 of the Administrative Code, 1917, provides that "Insular revenue and trust funds shall not be withdrawn from the Insular Treasury except upon warrant" and Section 621, provides that:

> No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an Officer of the Bureau of Audits thereunto authorized in writing by him.

While warrants may be drawn under Sections 616 and 1301 of the Code by the Insular Collector of Customs for refund of custom duties, such warrant cannot be paid

until the countersignature of the Auditor has been first had and obtained.

Thus it is that the accounts of the Insular Collector of Customs are required to be audited and settled by the Auditor for the Philippine Islands and the warrants signed by the Collector for refunds of duties are valueless until countersigned by the Auditor and in both instances the plain and unambiguous terms of the statute makes the Auditor's decisions final and conclusive on the Collector. We respectfully submit that it is difficult to conceive upon what theory all discretion is confined to the Collector and that the Auditor's duties in the premises are merely ministerial.

The provision of Act No. 355 of the Philippine Commission in 1902 authorizing an appeal from the decision of the Insular Collector of Customs to the Court of Customs Appeal, changed in 1905 by Act No. 1405 to authorize such appeal to a Court of First Instance, and now carried in Sections 1383 and 1384 of the Administrative Code of the Philippine Islands, in nowise affects the jurisdiction of the Auditor over the allowance of claims by an executive branch of the Government. In the Organic Act the Congress provided:

> The laws now in force in the Philippine Islands shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States. (Section 6.)
>
> The legislative authority herein provided shall have power when not inconsistent with this Act, by due enactment to amend, alter, modify, or appeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit. (Section 7.)

Thus the above provisions relating to appeal from the decision of the Insular Collector of Customs, whether considered as in force at the time of the enactment of the Organic Act, or as amended, altered, or modified by

the Philippine Legislature since that time, must square with the provisions of the Organic Act, else they must fall. To construe them as carving out of all the claims against the Philippine Government a class of claims over which the Auditor has no control and concerning which he has merely a ministerial duty to perform, as the Supreme Court of the Philippine Islands did construe them in this case, is to fly in the face of the express provisions of the Organic Act in defining the powers and duties of the Auditor, that "he shall perform a like duty with respect to all Government branches."

A construction consistent with the provisions of the Organic Act and one that gives full effect to the provisions of the Administrative Code is the one to be sought, and its discovery presents no difficulty. Such a construction is that the Congress and the Philippine Legislature have consented that the Philippine Government may be sued in the Courts of First Instance, with an appeal therefrom to the Supreme Court of the Philippine Islands, on a claim for refund of custom duties, which claim has been passed upon by the Insular Collector of Customs, when, and only when, the suit is commenced by way of appeal from the decision of the Insular Collector of Customs, either by an aggrieved claimant or by the head of the Department (Secretary of Finance) on behalf of the Government, and when such appeal is taken within fifteen days after notice of the decision of the Insular Collector of Customs. Thus when a suit is so commenced, and in no other manner is a suit on such a claim against the Government authorized, the determination of the validity of the claim is transferred from the jurisdiction of the Executive Department of the Government to that of the Judicial Department, over which the Auditor neither has nor claims any control. The decision of the court in such a case is a judgment, not reviewable except by the Supreme Court, and payable out of the general and indefinite appropriation made by Act. No. 357 of the Philippine Commission.

On the other hand where such a claim is passed upon by the Insular Collector of Customs, but no appeal is taken from his decision as provided above, that is no suit is commenced in the Court of First Instance in the manner and within the time provided as set forth above, the claim remains within the jurisdiction of the Executive Branch of the Government, and the decision of the Insular Collector of Customs thereon, being the decision of an officer of the Executive Branch of the Government, is reviewable by the Auditor as are such decisions of the officers of all the executive branches, and is final and conclusive, except for the appeal to the Governor General and the Secretary of War provided by Section 25 of the Organic Act.

We, therefore, respectfully submit that the construction placed upon the provisions of the Organic Act by the Supreme Court of the Philippine Islands is erroneous, and involves a question of substance relating to the construction of said Act which has not been, but should be, settled by this Court.

VI

TO GRANT A WRIT OF MANDAMUS WHERE THE LAW PROVIDES A PLAIN, SPEEDY AND ADEQUATE REMEDY IS CONTRARY TO THE DECISIONS OF THIS COURT.

The Organic Act provides that:

> Any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authority relied on for reversing such decision.
>
> If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal

> and transmit it to the auditor, and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive. (Section 25.)

This remedy is plain, speedy and adequate, and the law provides it as an exclusive and final remedy. The granting of the writ of mandamus in the face of such a remedy is contrary to the rule laid down by a long line of decisions of this Court that where the law provides administrative appeals the Court will not interfere with extraordinary legal process, at least, until final decision is had upon the administrative appeal. (*Ekiu* v. *United States*, 142 U. S. 651; *United States* v. *Sing Tuck*, 194 U. S. 161; *United States* v. *Ju Toy*, 198 U. S. 253; *United States* v. *Duell*, 172 U. S. 576.)

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

NOTICE OF FILING PETITION

Messrs. Britton & Gray,
Attorneys at Law,
Wilkins Building, 1512 H Street, N. W.,
Washington, D. C.

Attention of: Mr. Lawrence H. Cake.

Gentlemen:

Please take notice that a petition for a writ of certiorari directed to the Supreme Court of the Philippine Islands in the case entitled in that court, "Ynchausti and Company, Petitioner, versus Ben F. Wright, as Auditor for the Philippine Islands, Respondent," was filed in the Supreme Court of the United States on the 6th day of March, 1926, by Ben F. Wright, Auditor for the Philippine Islands, as petitioner, together with supporting brief and transcript of the record in the case.

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

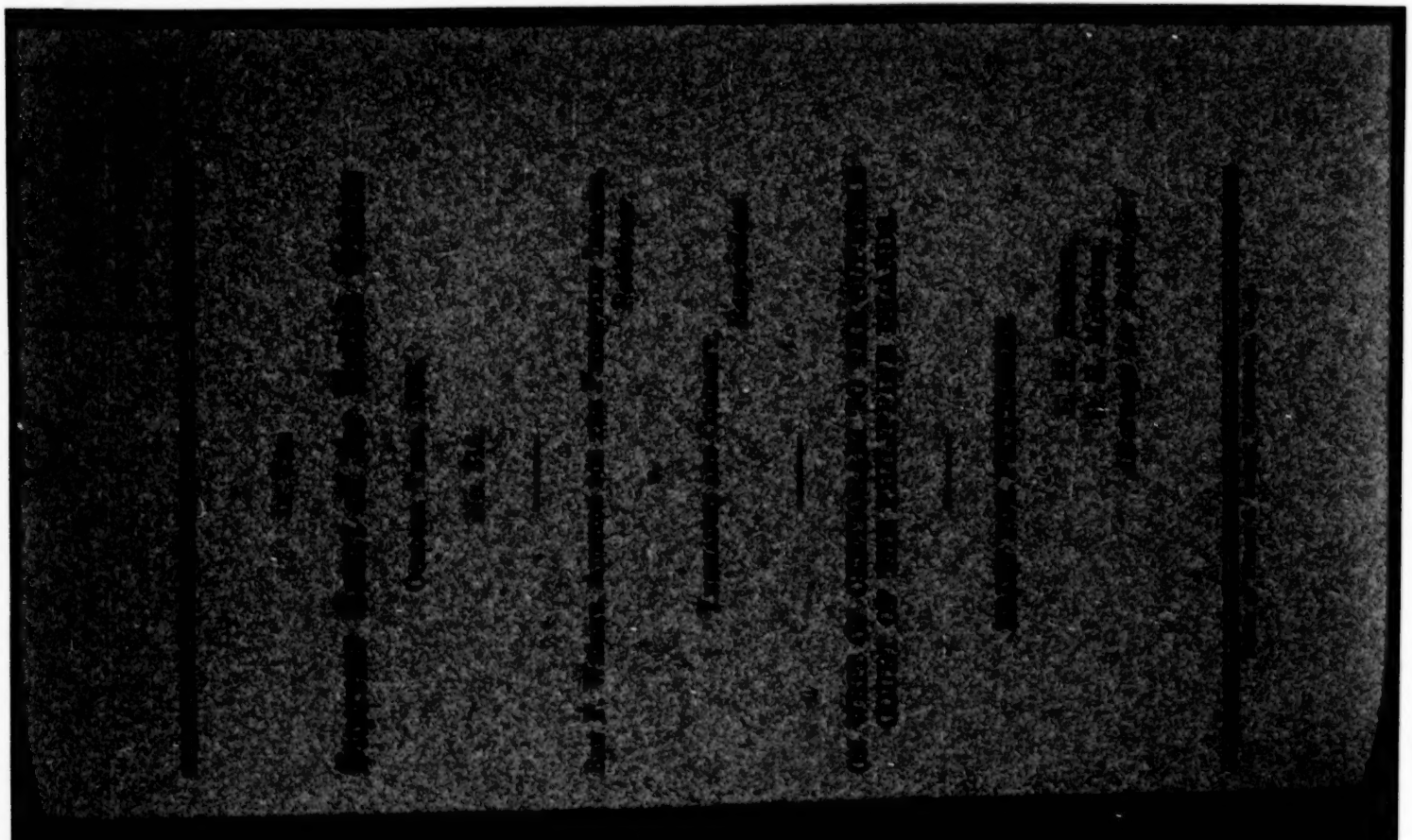
Washington, D. C.,
March —, 1926.

ACCEPTANCE OF SERVICE

Due, legal and timely service of the foregoing petition, brief and notice, and of the transcript of the record in the case in the court below, by delivery of printed copies thereof is hereby acknowledged this 6th day of March, 1926, at Washington, D. C.

BRITTON & GRAY,
By Lawrence H. Cake
Attorneys for Respondent.

PETITIONER'S BRIEF



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In The

Supreme Court of the United States

October Term, 1926.

No. 316.

Ben F. Wright, Auditor for the Philippine Islands,
Petitioner,

v.

Ynchausti and Company,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This case is here on certiorari to the Supreme Court of the Philippine Islands to review a judgment entered

October 6, 1925 (R-132) granting the petition of Ynchausti and Company (petitioner below and hereinafter referred to as Company), for a writ of mandamus directing Ben F. Wright, Auditor for the Philippine Islands (respondent below and hereinafter referred to as the Auditor) to countersign a certain warrant drawn by the Insular Collector of customs (hereinafter referred to as Collector) as refund of customs duties in the sum of P159,960.00 chargeable to a general appropriation in the Insular Treasury for refund of customs duties erroneously and illegally collected.

STATEMENT OF THE CASE

The pleadings below consisted of the Company's petition (R-1, 5) the Auditor's answer (R-12, 17) and the Company's demurrer thereto (R-17, 18). By a divided court the demurrer was sustained and judgment entered granting the writ as prayed. As stated in the dissenting opinion (R. 87-91), the only facts properly before the court were those alleged in the petition, which were admitted in the answer and those alleged in the answer which the demurrer thereto necessarily admitted. These facts may be epitomized as follows:

The Company is the operator of the Steamship *Venus* engaged in the coastwise trade of the Philippine Islands. Certain repairs and reconstruction work were made on said vessel in Hongkong, China, and upon return of the vessel to Philippine waters on or about October 20, 1924, the Collector assessed P159,960.00 customs duties on the vessel as provided by paragraph 200 of Section 8, of the Philippine Tariff Act of 1909 (36 Stat. 159), as amended by Act No. 2872, on the ground that adequate facilities were available in the Philippine Islands for making such repairs,

reasonably economically, and within a reasonable time. The Auditor approved the assessment and thereupon the said sum of P159,960.00 was collected by the Collector and deposited pursuant to Section 14 of Act No. 2935, in the Insular Treasury, as a part of the general unappropriated fund in said Treasury.

Thereafter, within the prescribed time, the Company, in accordance with Section 1370, Administrative Code of the Philippine Islands, 1917 (hereinafter referred to as the Code), presented a written protest to the Collector alleging that adequate facilities for making the repairs and doing the reconstruction work on the *Venus* were not available in the Philippine Islands and claiming refund of P159,960.00 paid as customs duties on the ground of exemption under paragraph 200, Section 8, and paragraph 348, Section 11, of the Philippine Tariff Act of 1909. The only fund out of which customs duties could be refunded without specific action of the Philippine Legislature, approved by the Governor General, is the general and indefinite appropriation made by Act No. 357, as amended by Act No. 1515, for refunds of customs duties *erroneously* and *illegally* collected.

The Collector heard and examined the Company's protest and on October 31, 1924 (R-19, 20) rendered his decision sustaining the same and concluding that a refund in full should be made of the customs duties collected on the *Venus*. A copy of the decision was sent by the Collector to the Auditor as provided in Section 1386 of the Code and the latter made or caused to be made inquiries and investigations for the purpose of ascertaining and verifying the correctness of the conclusion that the repairs and reconstruction work could not have been made in the Philippine Islands.

(R-14, par 11). The purpose of such ascertainment and verification was to enable the Auditor to determine whether the refund ordered by the Collector could be paid from the general and indefinite appropriation made by Act No. 357, as amended; that is, whether the refund ordered by the Collector was of customs duties *erroneously* and *illegally* collected.

The Auditor became convinced, as a result of his inquiries and investigations, that adequate facilities for making the repairs on the *Venus* were available and by letter dated October 6, 1924 (R-45, 49), requested the Collector to reconsider his decision that the customs duties collected should be refunded. The next day the Auditor requested the Secretary of Finance to remove the matter to the Court of First Instance, as provided in Section 1386 of the Code, should the Collector refuse to reconsider his decision. (R-50) Receiving no response to either letter, the Auditor repeated his request on November 12, 1924, to the Secretary of Finance and on November 14, 1924, addressed a second request to the Collector and enclosed additional evidence to the effect that the repairs could have been made in the Philippine Islands reasonably economically, and within a reasonable time. (R-50-52)

The Auditor received no response to either of these second requests and on November 26, 1924, the Collector presented to the Auditor for countersignature, pursuant to Sections 5 and 614 of the Code, a warrant drawn in favor of the Company for P159,960.00, chargeable to the general and indefinite appropriation made by Act No. 357, as amended, the amount of the refund ordered by the Collector on the protest. The Auditor returned the warrant on November 28, 1924, to the Collector without his countersignature with the

information that the warrant could not be countersigned until his request for reconsideration had been passed upon by the Collector. (R-52, 53) The Collector returned the papers the same day with the statement that he found no justification for reconsideration of his decision. (R-53) The Auditor again returned the warrant to the collector with request that he reconsider his decision that the duties should be refunded (R-53, 57). Before the Auditor had finally concluded whether or not he would countersign the warrant this action was commenced (R-16). The majority and minority opinion of the Court below are contained in the transcript of record (R-61, 130).

THE QUESTIONS PRESENTED

1. Whether the Auditor performs and exercises a mere ministerial duty controllable by mandamus in the audit and settlement of claims and accounts for refund of customs duties approved by the Collector, and in the countersignature of warrants on the Treasury of the Philippine Government for payment of refunds of customs duties or whether such duties of the Auditor are discretionary.

2. Whether the Supreme Court of the Philippine Islands has jurisdiction to require the Auditor, appointed to and holding office at the pleasure of the President of the United States, to approve the decisions of, and to countersign the warrants drawn by, the Collector and chargeable to general and indefinite appropriations in the Insular Treasury for refund of customs duties *erroneously* and *illegally* collected.

3. Whether the laws of the United States confer exclusive jurisdiction and authority on the Collector independently of the Auditor to audit, settle, and al-

low claims for refund of customs duties, and if not, whether the construction of the court below of the laws of the Legislature for the Philippine Islands that all matters of discretion with respect to such claims are confided in the Collector is the correct construction of said laws, and if so, whether such laws are valid.

4. Whether the jurisdiction and authority of the Auditor to settle and adjust all claims for or against the Government for the Philippine Islands or any of its Governmental subdivisions and branches and which settlements are final and conclusive on the executive departments and branches of said Government and its subdivisions and branches include jurisdiction and authority to review the decisions of the Collector on claims for refund of customs duties chargeable to a general and indefinite appropriation for the refund of duties erroneously or illegally collected.

5. Whether the Government of the Philippine Islands is not the real party in interest and a necessary and indispensable party in any proceeding by mandamus against the Auditor to require him to allow a claim for refund of customs duties and to countersign a warrant chargeable to a general and indefinite appropriation in the Insular Treasury in payment of said claim.

6. Whether the Governor General and the Secretary of War as the superior officers of the Auditor are not necessary and indispensable parties in any mandamus proceeding against the Auditor to require him to allow a claim for refund of customs duties and to countersign a warrant in payment thereof.

7. Whether the powers of the Collector in the refund of customs duties when no appeal is taken to the Court

of First Instance as provided in Sections 1383, 1384, and 1386 of the Code are final and conclusive on the Auditor as well as on the claimant.

8. Whether the Supreme Court of the Philippine Islands has jurisdiction to control by mandamus the Auditor in the exercise of his jurisdiction and authority in the audit, settlement, and allowance of claims against the Philippine Government chargeable to appropriations made in general terms for refund of customs duties alleged to have been erroneously or illegally collected.

9. Whether the sole and exclusive remedy of a claimant for refund of customs duties denied by the Auditor is not limited to an appeal to the Governor General and to the Secretary of War or to the Philippine Legislature when appeal to the Court of First Instance is not taken.

10. Whether the Company had a plain, speedy, and adequate remedy at law, in the appeal to the Governor General and Secretary of War as provided in Section 25 of the Act of August 29, 1916, 39 Stat. 554, (hereinafter referred to as the Organic Act).

11. Whether the provisions of Section 24 of the Organic Act that "the decisions of the Auditor shall be final and conclusive upon the Executive branches of the Government" in effect confers jurisdiction upon the Supreme Court for the Philippine Islands to control such decisions by mandamus, and to direct that such decisions be made by the Auditor in a certain and specified way, particularly when payment of the claim must be made from a general and indefinite appropriation for refund of customs duties erroneously or illegally collected.

12. Whether, if the laws confer on the Auditor jur-

isdiction and authority in the audit and settlement of claims and accounts subject to right of appeal to the Governor General and the Secretary of War which are judicial in character, such laws are constitutional.

13. The meaning of the terms "accounts" and "audit" as used in Section 24 of the Organic Act and in the Accounting Law (chapter 26, Administrative Code, as amended by Act No. 3066).

14. Whether the Supreme Court of the Philippine Islands may require by mandamus moneys in general appropriations in the Insular Treasury to be paid to any claimant when neither the United States nor the Legislature for the Philippine Government has consented that the latter Government be sued or proceeded against indirectly in mandamus proceedings.

CONTENTIONS OF THE AUDITOR

The Auditor contends that the court below erred in the following particulars:

1. In assuming jurisdiction of this cause.

2. In concluding that the Company did not have a plain, speedy, and adequate remedy at law.

3. In not holding that the Government of the Philippine Islands was the real party in interest and a necessary and indispensable party.

4. In not holding that the Governor General and the Secretary of War as his superior officers were necessary and indispensable parties.

5. In its construction of the law as to the jurisdiction, authority, and responsibility of the Auditor with respect to claims against the Philippine Government and particularly with respect to the Auditor's exclusive jurisdiction and authority to determine the

availability of the general and indefinite appropriation made by Act No. 357, as amended by Act No. 1515, for refund of custom duties erroneously or illegally collected.

6. In its construction of the law as to the jurisdiction, authority, and responsibility of the Auditor with respect to decisions of the Collector on claims for refund of customs duties, when no appeal from such decisions has been taken to the Courts of First Instance, as provided in Sections 1383, 1384, and 1386 of the Code.

7. In its construction of the law as to the finality of decisions of the Collector on claims for refund of customs duties, in so far as the Auditor is concerned.

8. In considering or passing upon the merits of the Company's claim for refund of customs duties.

9. When having erroneously assumed jurisdiction to pass upon the merits of the Company's claim in considering facts not properly before it.

10. In its construction of the law as to the finality of the decisions of the Auditor on the Executive branches of the Government, including the Collector, who is a subordinate of the Secretary of Finance.

11. In deciding that the duties of the Auditor with respect to claims for refund of customs duties allowed by the Collector and in the countersignature of warrants chargeable to a general and indefinite appropriation in payment thereof are ministerial duties.

12. In deciding that if the law imposed duties judicial in character upon the Auditor, Governor General, and Secretary of War, such laws are unconstitutional.

13. In its construction of the terms "accounts" and "audit" as used in the Accounting Law and in Section 24 of the Organic Act.

14. In its disregard of the following applicable and controlling decisions of the Supreme Court of the United States:

(a) *Gaines* v. *Thompson* (7 Wall. 347), *Lee* v. *Johnson* (116 U. S. 48), and *Orchard* v. *Alexander* (157 U. S. 372), that because duties of executive officers in the administration of the law require in their performance the examination and consideration of evidence and the exercise of judgment thereon, they are none the less executive duties.

(b) *Murray's Lessee et al.* v. *Hoboken Land and Improvement Company* (59 U. S. 272), that administrative duties, such as the auditing of accounts, may involve on the part of an executive officer the exercise of judgment upon both law and fact, may be, in the enlarged sense, judicial acts, but that is not sufficient to bring such matters under the judicial powers.

(c) *Dunlap* v. *Black* (128 U. S. 40) and *Redfield* v. *Window* (137 U. S. 636), that mandamus will lie to compel the performance *only* of duties the performance of which the law requires without further question, but the courts will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law.

(d) *Brashear* v. *Mason* (6 Howard 92) and *Decatur* v. *Paulding* (14 Peters, 497), that where consent has not been given to sue the Government, moneys to the credit of general appropriations in the Treasury may not be controlled by extraordinary judicial process directed against officers of the Government, the situation with respect to suits against the Government for the Philippine Islands being the same as that existing prior to the creation of the Court of Claims in 1855 for suits against the United States.

(e) *United States* v. *Lynch* (137 U. S. 280), that even after the Government had consented to be sued, the auditors and comptrollers of the United States Treasury may not be controlled by extraordinary judicial process in the settlement of claims and countersignature of warrants chargeable to general appropriations in the United States Treasury, Section 24 of the Organic Act providing that the Auditor, except as to appeal to the Governor General and Secretary of War, shall have "like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury." (The exception referred to is not a limitation of the authority of the auditor, for he, in fact and in law, has greater powers than the former auditors and comptrollers of the United States Treasury.)

(f) *Work* v. *United States, ex rel Rives* (267 U. S. 175), that extraordinary judicial process cannot be invoked to operate as a writ of error to review the discretionary acts of public officers.

(g) *Ekiu* v. *United States* (142 U. S. 161) and *Baltimore and Ohio Railroad* v. *Pitcairn Coal Co.* (215 U. S. 481), that there can be no resort to extraordinary judicial process even in an otherwise proper case until exhaustion of administrative remedies.

(h) *Webster* v. *Fall et al.* (266 U. S. 507), that in any proceeding by extraordinary judicial process against a public officer, the superior of such officer is a necessary and indispensable party. (By Section 24 of the Organic Act the Auditor is "under the general supervision of the Governor General" and his decisions are reviewable by both the Governor General and the Secretary of War.)

(i) *Wells* v. *Roper* (246 U. S. 335) *Louisiana* v. *Mc-*

Adoo (234 U. S. 627), and *Oregon* v. *Hitchcock* (202 U. S. 60), that a proceeding against a public officer concerning public money or property is in essence a proceeding against the Government, which is a necessary and indispensable party, jurisdiction being determined by the real and not by the nominal parties in interest.

ARGUMENT

Introduction

This Court granted April 26, 1926, a writ of certiorari pursuant to Sections 7 and 8 of the Act approved February 13, 1925 (43 Stat. 940), to review the judgment of the Supreme Court of the Philippine Islands entered October 6, 1925, issuing a writ of mandamus against the Auditor requiring him to allow a claim of the Company for refund of customs duties and to countersign a warrant chargeable to a general and indefinite appropriation in payment thereof. The Court also granted a motion to advance this case on its Docket.

As stated in our brief in support of the petition for certiorari (p. 9), this review is not sought in the hope that this Court may find that the Company is not entitled to a refund of the customs duties or that errors were committed in the decision of the lower court on the merits of the Company's claim. Counsel for the Auditor believe that while the court below concerned itself with and passed upon the merits of the Company's claim, such merits were upon no theory of the case properly before said court and that because of insurmountable jurisdictional obstacles which were not met and satisfied in the court below such merits are not properly before this Court. Therefore, the

argument hereinafter made on behalf of the Auditor will not concern itself with the merits of the Company's claim; that is, whether or not facilities were available in the Philippine Islands to make the repairs and reconstruction work on the S. S. *Venus* reasonably economically and within a reasonable time and whether the general and indefinite appropriation for refund of customs duties erroneously and illegally collected was available for refund of the customs duties collected because the repairs on the *Venus* were made in Hongkong instead of in the Philippine Islands.

Points

I.

Where there is no appropriation therefor neither any officer of the Executive Department nor any court has authority to direct payment of a claim against the government, such authority being confided exclusively to the Legislature Department of the Government.

II

Where an appropriation has been made by the Legislative Department of the Government in general terms and indefinite in amount for the payment of claims of a particular class or character, the question whether such appropriation is available for the payment of a particular claim is a discretionary matter not within the jurisdiction or power of the court below.

III

The determination of the availability of the general and indefinite appropriation made by the Philippine

Legislature for the refund of customs duties erroneously or illegally collected is a quasi judicial or discretionary matter within the exclusive jurisdiction of the Auditor. For the court below to attempt to change, control, or disturb, by mandamus, this determination is contrary to the rule established by a long line of decisions of this Court.

IV

The duties of the Auditor for the Philippine Islands in the settlement of claims of a class payable from general appropriations and the counter-signature of warrants therefor are quasi-judicial or discretionary. The attempt of the court below to compel the performance of these duties in a particular manner is in disregard of and contrary to the decisions of this Court.

V

The Supreme Court of the Philippine Islands has no greater jurisdiction in mandamus actions than have the courts of the United States.

VI

The fact that the law imposes duties upon and grants powers to the Auditor, the Governor General and the Secretary of War, which are judicial in character, does not vitiate such laws nor make such duties and powers any the less executive duties and powers.

VII

The jurisdiction of the Collector to settle claims for refund of customs duties is subordinate to that of the Auditor.

VIII

An excellent illustration of this supervisory power and responsibility of the Auditor is found in a recent decision of the highest court of England.

IX

To limit the term "account" as used in the Accounting Law and in Section 24 of the Organic Act to the meaning given it by the court below is contrary to the settled construction of statutes of the United States with which the use of the term is assimilated and would destroy the accounting system created by Congress for the Philippine Islands.

X

To limit the term "audit" as used in the Accounting Law and Section 24 of the Organic Act as was done by the court below denies the Auditor the essential jurisdiction and authority conferred upon him in the Organic Act.

XI

The case of Smith v. Jackson (246 U. S. 338) distinguished.

XII

To grant a writ of mandamus where the law provides a plain, speedy, and adequate remedy is contrary to decisions of this Court.

XIII

The Government for the Philippine Islands is the real party in interest and a necessary and indispensable party.

XIV

The Governor General and the Secretary of War are the superior officers of the Auditor and are indispensable and necessary parties.

Point I

Where there is no appropriation therefor neither any officer of the Executive Department nor any court has any authority to direct payment of a claim against the Government, such authority being confided exclusively to the Legislative Department of the Government.

Both Article I, Section 9, of the Constitution of the United States and Section 3 of the Organic Act of the Philippine Islands provide that no money shall be drawn from either Treasury, respectively, except in pursuance of an appropriation by law; that is, except with the consent of the Legislative Department of the Government. Neither the Executive nor the Judicial Departments of either Government have authority to appropriate money or to take money from the public treasury without the consent of the Legislative Department. The decision of this court in *Reeside* v. *Walker* (11 Howard, 272) is conclusive on this point.

Point II

Where an appropriation has been made by the Legislative Department of the Government in general terms and indefinite in amount for the payment of claims of a particular class or character, the question whether such appropriation is available for the payment of a particular claim is a discretionary matter not within the jurisdiction or power of the court below.

The situation in the Philippine Islands is similar to that existing in the United States prior to the act of February 24, 1855 (10 Stat. 612), establishing the Court of Claims; that is, there is no general provision of law whereby suit may be brought against the Government for the Philippine Islands. During this period, prior to 1855, there were several attempts to secure public money in the United States Treasury by means of extraordinary judicial process against various officers of the Government. Such a case was that of *Brashear* v. *Mason* (6 Howard 92, 100), wherein the Court said:

> "We are also of opinion, that if the plaintiff had made out a title to his pay as an officer of the United States Navy, a mandamus would not lie in the court below to enforce the payment.
>
> "The Constitution provides, that no money shall be drawn from the Treasury but in consequence of appropriations made by law. (A. I, sec. 9). And it is declared by act of Congress (3 Statutes at Large, p. 689, sec. 3), that all moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of these departments, countersigned by the second comptroller.
>
> "And, by the Act of 1817 (3 Stat. at L., p. 367, secs. 8, 9), it is made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. * * *
>
> "Formerly, the moneys appropriated for the War and Navy Departments were placed in the Treasury to the credit of the respective Secretaries. That practice has been changed, and all the moneys in the Treasury are in to the credit or in the custody of the Treasurers, and can be drawn out, as we have seen, only on the warrant of the

Secretary of the Treasury, countersigned by the comptroller.

"In the case of *Mrs. Decatur* v. *Paulding* (14 Pet. 497), it was held by this court that a mandamus would not lie from the Circuit Court of this District to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear, in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund, also, was under the control of the Secretary, and the moneys payable on his own warrant.

"Still the court refused to inquire into the merits of the claim of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the Secretary, on the ground that the court below had no jurisdiction over the case, and, therefore, the question not properly before this court on the writ of error.

"The court say, that the duty required of the Secretary by resolution was to be performed by him as the head of one of the executive departments of the Government, in the ordinary discharge of his official duties; that in general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties; that the head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not by mandamus act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties.

"The court distinguished the case from *Kendall* v. *The United States* (12 Pet. 524), where

there was a mandamus to enforce the performance of a mere ministerial act, not involving, on the part of the officer, the exercise of any judgment or discretion.

"The principle of the case of Mrs. Decatur is decisive of the present one. The facts here are much stronger to illustrate the inconvenience and unfitness of the remedy.

"Besides the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers, under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it.

"The Secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and if not enough, how it shall be apportioned among the parties entitled to it.

"These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the Government, to the payment of whose demands the particular fund is applicable, are interested, as well as the Government itself. At most, the Secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it, and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned.

"It will not do to say, that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the Treasury applicable to the demand; for, upon this ground, any creditor of the Government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and

> the proceeding by mandamus would become as common, in the enforcement of demands upon the Government, as the action of assumpsit to enforce like demands against individuals."

In addition to *Decatur* v. *Paulding*, referred to in the above quotation from *Brashear* v. *Mason*, there were similar holdings in *United States* v. *Guthrie* (17 Howard 284), *Reeside* v. *Walker, supra*, and *Case* v. *Terrell* (11 Wall. 199). It is to be noted further that in the *Walker case* the claim had been established by a decision of a court, whereas in this case the claim had not been so established.

The court below apparently either was not aware of these decisions or failed to comprehend their significance, when stating (R., p. 84):

> "To show that mandamus will not lie, the answer alleges that the money so paid under protest has since been converted into the Government's Treasury, and hence is now beyond the reach of the courts. There is no merit in that contention, and it was not relied upon in argument. The answer also alleges: 'To meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 515.' This provision is in the nature of a permanent and continuous appropriation for the payment of claims like the one in question."

This language would indicate that the court below considered it had ample jurisdiction to direct the payment of a claim against the Government out of an appropriation made in general and indefinite terms. In any event, such is the result of the judgment below and

same is clearly contrary to the *Decatur, Brashear, Guthrie,* and *Reeside cases, supra.*

Neither these cases nor the instant case are to be confused with such cases as *Smith* v. *Jackson* (246 U. S. 388), *United States* v. *MacVeagh* (214 U. S. 124), or *Houston* v. *Ormes* (252 U. S. 469). These cases are hereinafter distinguished (pp. 69, 73) and it is sufficient to state here that same arose after the establishment of the Court of Claims in 1855 and all represent instances where Congress had either appropriated a specific sum to pay a specific salary, as in the *Jackson case,* or had appropriated specific sums to pay specific claims as in the *MacVeagh* and *Ormes cases.* Such is not the situation here, for, as in the *Brashear case,* a general sum had been appropriated to pay a specific class of claims.

Point III

The determination of the availability of the general and indefinite appropriation made by the Philippine Legislature for the refund of customs duties erroneously or illegally collected is a quasi-judicial or discretionary matter within the exclusive jurisdiction of the Auditor. For the court below to attempt to change, control, or disturb by mandamus this determination is contrary to the rule established by a long line of decisions of this court.

Section 24 of the Organic Act (39 Stat. 554) provides that the Auditor "shall have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury," except that there is an administrative appeal from his decisions to the Gov-

ernor General and the Secretary of War. The authority then conferred upon the auditors and comptroller of the Treasury was that stated in the Dockery Act of July 31, 1894 (28 Stat. 205, 211), and was of great antiquity. These officers had been continued in existence since the Ordinance of Septembr 26, 1778, of the Continental Congress (Vol. XII, Journals, Continental Congress, pp. 956, 961), by the acts of September 2, 1789 (1 Stat. 65), March 3, 1817 (3 Stat. 366), and July 31, 1894, *supra*, and similar officers were found in the Governments of the Thirteen Colonies as shown by the references collected in the margin.[1]

[1] See Articles XXII and XXIX of the Constitution of South Carolina of 1778: *Poore* "Colonial Constitutions" II 1617, 1625. Article 7 of the Constitution of Delaware of 1776: *Poore* I 274, provided that the governor who was elected by the joint vote of the two houses "may draw for such sums of money as shall be appropriated by the General Assembly and be accountable to them for the same." Article X of the Constitution of Maryland of 1776: *Poore* I 822: provided that the "House of Delegates may examine and pass all accounts of the state relating either to the collection or expenditure of the revenue or appoint auditors to state and adjust same." Article XI of the Constitution of Massachusetts provided that "No money shall be issued out of the treaury of this commonwealth and disposed of (except such sums as may be appropriated for the redemption of credit or treasurer's notes or interest arising thereon) but by warrant under the hand of the Governor for the time being, by and with the advice and consent of the council and agreeably to the acts and resolves of the General Court." The council was elected by and composed of members of the General Court.

Article XLIV of the Constitution of Vermont of 1777: *Poore* II 1865: provided for a council of censors composed of members of the general assembly to assist the governor and to determine, among other things, "in what manner the public moneys have been disposed of, and whether the laws have been duly executed." The constitution of New Hampshire of 1781: *Poore* II 1290: provided for an auditing committee consisting of two members of the upper and three members of the lower house and prohibited the treasurer from paying out any money "but by warrant under the hand of the governor for the time being and with the advice and consent" of the auditing committee in accordance with law. Article XXII of the Constitution of New York of 1777: *Poore* II 1336: required the legislature to appoint the treasurer, as did most all of the other state constitutions of the period, and the practice

As pointed out in the *Brashear case, supra,* the Comptroller of the Treasury was required to countersign all warrants drawing money from appropriations in the Treasury for the reason, as stated by Alexander Hamilton,[2] "the comptroller is a check on the Secretary" as to the legality of an expenditure from an appropriation. Such requirement is now found in Section 11 of the Act of July 31, 1894, and the Legislature of the Philippine Islands made detailed provi-

[2]Hamilton's Works, Vol. VII, p. 548, quoted by Comptroller Lawrence, Vol. II, First Comptroller of Treasury's Decisions, 382, 390. Secretary of the Treasury Sherman said that "A Secretary of the Treasury would not even mention the subject of a claim to an auditor or a comptroller. If he should do so he would show his utter unfitness for the office. No man who ever held that office would do a thing of that kind. It would be in the nature of a criminal act for him to attempt to influence his subordinates." (Page 33, Accounting System of the United States Treasury Department, 1905.)

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seems to have been to appoint a committee of the legislature to audit the accounts of the treasurer. See Article XII of the Constitution of New Jersey of 1776: *Poore* II 1312. Article XIX of the Constitution of North Carolina of 1776: *Poore* II 1413: authorized the governor "to draw for and apply such sums of money as shall be authorized by the general assembly for the contingencies of the government and be accountable to them for the same."

Article XI of the Pennsylvania charter of 1683: *Poore* II 1524: provided that the governor and the provincial council, elected by the people, should at all times "have power to inspect the management of the public treasury and punish those who shall convert any part thereof to any other use than what has been agreed upon by the governor, provincial council and general assembly." The Pennsylvania constitutions of 1776 and 1778 contained substantially similar provisions: *Poore* II 1583. The House of Burgesses of Colonial Virginia had pronounced control over the public money of that colony. For instance, by acts of March, 1756, 29th George II, September, 1758, 32nd George II and November, 1761, 2 George III: 7 Henning, Va., Statutes at Large, 33, 243, and 467: it was provided: "That from and after the passing of this act, John Robinson, esquire, shall be and he is hereby nominated, constituted and appointed Treasurer of the revenue arising from the duties laid by the before recited act of assembly and of all other public money for public uses, by virtue of any other act or acts of assembly. To hold the said office so long as he shall continue speaker of the house of burgesses, and from the time of his being out of said office to the end of the next session of the assembly. * * * And he shall be accountable for the

sions for its exercise by the Auditor in Section 621 of the Code, which provided that:

> "No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an Officer of the Bureau of Audits thereunto authorized in writing by him."

The Court of Claims very pertinently said in *Geddes* v. *United States* (38 Ct. Cls. 428), at page 444, that:

> "The accounting officers are the guardians of the appropriations. It is their business to see that

said money to the general assembly." All other officers were required to account to the treasurer. See act of 1758, 32nd George II. The offices of treasurer and speaker of the house of burgesses were separated by the act of November, 1766, 7th George III, and one Nicholas was appointed by the general assembly with substantially the same powers. This statute, like that of Parliament, provided: "That Lewis Burswell, George Wythe, John Blair, the younger, John Randolph, and Benjamin Waller, esquires [all members of the general assembly], or any three of them, be, and they are hereby appointed a committee to examine, in the months of June and December, in each year, into the state of the treasury; and the said treasurer is hereby required to lay before the said committee all of the accounts of the treasury [which he was required by section iv to keep in detail], and produce the money in his hands, * * * and the committee shall certify the same to the next meeting of the assembly:" 7 Henning 210. See also acts of November, 1769, 10th George III, and February, 1772, 12th George III; 8 Henning 395, 588: continuing the provisions of the act of 1776. See also act of 1775: 9 Henning 16, 64 and 71.

The constitution adopted June 27, 1776, for Virginia provided in Article XIX that, "A treasurer shall be appointed annually by joint ballot of both houses:" 9 Henning 118. By act of October, 1776, it was recited that "the accounts of the treasurer have been examined and passed by the general assembly to the 19th day of October last past." This same statute provided for a committee of the general assembly to audit the public accounts from time to time and by act of a few days later, amended by the act of October, 1778: 9 Henning 245, 536, a board of auditors appointed by the general assembly and removable only by them was created to audit the public accounts and no money could be drawn from the treasury save on warrants countersigned by the auditors. This accounting system had more drastic powers than have ever been surrendered by the Congress of the United States to the accounting officers of the United States.

no money is paid out of the Treasury unless the payment is authorized by an appropriation act. It is not their business to adjudicate abstract questions of legal right beyond the legal right of a person to be paid out of a specific appropriation. An appropriation constitutes the means for discharging the legal debts to the Government.

"The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them."

As stated in *Case* v. *Terrell, supra,* it is a fundamental principle of jurisprudence that a judgment cannot be rendered against a person not a party to a suit; when the Government has not consented to be sued, as is the case in the Philippine Islands, and the Auditor has denied the use of a general appropriation, as in this case, for the payment of a particular claim, the only remedy of an aggrieved claimant, other than the appeal provided in Section 25 of the Organic Act, is that pointed out in the *Reeside case, supra;* that is, in an appeal to the legislature for a specific appropriation, which, of course, is subject to the veto power of the Governor General.

It has been a uniform principle of the accounting system of the United States that the payment of claims should be by the accounting officers and not by the officers incurring or initially approving such claims. Secretary of the Treasury Woodbury in a report to the Senate dated December 5, 1834 (republished in 26 Congressional Record, 4305), said:

"It seems required, by a due regard to system, uniformity, and proper accountability, that

> neither those empowered by law to decide on the necessity of certain services and purchases nor those who make the purchases and contracts should also adjust the accounts rendered for them; but that the auditors themselves, whether the claims originate under the authority of the heads of bureaus or of Departments, should have the exclusive power, in the first instance, to judge of the reasonableness and just amount due, looking to all the evidence in the case, and to the laws and fixed prospective regulations that apply to it."

The House Committee on Revision of the Laws unfavorably reported February 16, 1869 (republished in 26 Congressional Record, 4342), a recommendation that the accounting act of March 3, 1817, as amended by the act of March 30, 1868 (15 Stat. 54), be modified, and said, among other things, that:

> "* * * power in the head of the War or any other Department to set aside and change the findings of the accounting officers of the Government is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the Department under whose direction the money was paid, or the claim accrued, then the whole system of checks to improper expenditures, which it was supposed had been established, falls to the ground."

Thus it was that Ex-President and now Chief Justice Taft could properly and accurately state at page

81 of his book on *Our Chief Magistrate and His Powers,* with respect to the discretion of the Comptroller of the Treasury under the Dockery Act of July 31, 1894, *supra,* that:

> "Then consider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his claim into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the Government have no appeal, and his decision is final."

and at page 125, that:

> "Congress may repose discretion in appointees of the President, which the President may not himself control. The instance I have already given is one of these, in which the Comptroller of the Treasury has independent quasi-judicial authority to pass on the question of what warrants are authorized by appropriation acts to be drawn by him on the funds of the Treasury. The President can appoint him and remove him, but may not control his construction of appropriation acts

and his signing, or withholding his signature from warrants in accordance with that construction."

There is no short cut to the obtaining of public money in the United States Treasury through extraordinary judicial proceedings against the Comptroller of the Treasury, now the Comptroller General, unless, of course, he should refuse to allow a claim and countersign a warrant where Congress had itself adjudicated the claim and had made a specific appropriation for its payment as in the McVeagh case, *supra*. The remedy of an aggrieved claimant was pointed out as early as 1823, by Attorney General Wirt (1 Opins. Atty. Gen. 624, 629); that is, in an appeal to Congress for a specific appropriation or, since 1855, to the courts for a judgment, but that judgment except in a limited number of cases must be specifically reported to Congress and an appropriation made before same may be paid. Act September 30, 1890. (26 Stat. 537.)[3]

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[3]An able discussion of administrative discretion in the matter of expenditures of appropriated moneys under our system of Government is contained in President Taft's Commission on Economy and Efficiency Report (H. R. Document, 854, 62d Congress, 2nd Session, pp. 64-78). It is there said (p. 74), among other things, that:

"The Revised Statutes (sec. 3678) provide that—

"'All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made and for no others.'

"The object of an appropriation is thus fixed by the terms of the appropriation, and the proper construction of these terms is a question of law. The construction to be placed on each appropriation has, however, been taken away from the heads of departments.

"The law provides, as has been said, that the accounts of expenditures under all appropriations shall be examined by one auditor, and, on appeal, by the Comptroller of the Treasury. To give to the heads of departments the right to have the law construed before action thereunder, the Dockery Act provided that—

"Disbursing officers or the head of any executive department or other establishment not under any of the executive departments may

See, however, *United States* v. *Babcock* (250 U. S. 328), where no such appeal to the courts could be taken.

Mandamus cannot be used as such a short cut, for this Court cogently stated in *United States* v. *Guthrie* (17 Howard 284), at page 303, that:

> "The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal Government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most starting considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for *it would occur, a priori, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or, rather, under such an absence*

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apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement. (Act of July 31, 1894, 28 Stat. 208.)

"These provisions of law necessarily limit the discretion of those having the disposition of appropriations which certainly, so far as the law is concerned, is subject to the control of the accounting officers of the Treasury."

of all rule, would, if practicable at all, be administered not by the great departments ordained by the constitution and laws, and guided by the modes therein prescribed, but by the uncertain, and perhaps contradictory action of the courts, in the enforcement of their views of private interests." (Italics supplied.)

Even since the United States has consented to be sued, it has been determined that mandamus against the auditors and comptrollers of the Treasury may not be used as such a short cut to the public funds in payment of a disputed claim. *United States* v. *Lynch* (137 U. S. 280). This is necessarily true for the following reasons:

Prior to the establishment of the Court of Claims in 1855, the decisions of the accounting officers were conclusive as to the merits of a claim, subject only to an appeal to certain specified administrative officers or to the Congress. Since that date their decisions are conclusive on the executive branches of the Government in all cases (Act of March 30, 1868, 15 Stat. 54, Section 191, Revised Statutes, Section 305 of the Act of June 10, 1921, 42 Stat. 24), subject only in certain specified cases to administrative appeal, and are conclusive upon the courts with respect to the availability of general appropriations in the Treasury; that is, as to the method of payment, for even after judgment by a court, the money to pay same must be specifically appropriated. Such decisions are reviewable by the courts only in the cases and in the courts and in the manner provided by statute. Mandamus is not the method authorized in this class of cases under the laws applicable to the Philippine Islands.

Since the Auditor with respect to general appro-

priations of the Philippine Government has even greater jurisdiction than the accounting officers of the United States have with respect to general appropriations in the United States Treasury, and since no such jurisdiction as has been assumed in this case ever has been conferred upon the courts of the Philippine Islands over the subject-matter of claims against the Philippine Government, nor (as will be hereinafter shown) to control by mandamus the Auditor in the performance of his discretionary duties in the settlement of claims and the countersignature of warrants in payment thereof, it would appear necessarily to follow that the judgment below is not only erroneous and in conflict with a long line of decisions of this Court, but if permitted to stand will seriously disrupt the system of Government for the said Islands as established by the laws of the United States.

Point IV

The duties of the Auditor for the Philippine Islands in the settlement of claims of a class payable from general appropriations and the countersignature of warrants therefor are quasi-judicial or discretionary. The attempt of the court below to compel the performance of these duties in a particular manner is in disregard of and contrary to the decisions of this Court.

The duties of the Auditor to "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government" and "to audit, in accordance with laws and administrative regulations, all expenditure of funds or property pertaining to or held in trust by the Government," and "to communicate directly with any per-

son having claims before him for settlement" and to "*perform a like duty with respect to all government branches*" and with "like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury" as specifically provided in Section 24 of the Organic Act are discretionary duties and comprehend the accounts of the Collector equally with accounts of all other branches of the Philippine Government.

Such duties are more discretionary than the duties conferred on the Secretary of the Interior by the Dent Act of March 2, 1919 (40 Stat. 1274), considered by this Court in *Work* v. *United States, ex rel Rives* (267 U. S. 175), for the Auditor of the Treasury for the Interior Department and the Comptroller of the Treasury were required under Section 236, Revised Statutes, and Section 11 of the Act of July 31, 1894 (28 Stat. 209), to audit and settle the claim after the Secretary of the Interior had made an allowance and to determine whether to countersign warrants in payment of any such claim. 27 Comp. Dec. 415. The theory underlying the express terms of the law is that stated by Postmaster General Kendall in his annual report of December 4, 1835, recommending an independent audit by the auditors and comptrollers of the Treasury of the transactions of the Post Office Department and which audit was established by the Act of July 2, 1836 (5 Stat. 80), in accordance with such recommendation. He said, among other things, that:

> "• • • It is believed to be a sound principle, that public officers, who have an agency in originating accounts should have none in their settle-

ment. The War and Navy Departments are in general organized upon this principle * * * If from any cause an illegal expenditure be directed by the head of a Department, it is the duty of the disbursing agent not to pay the money; and if he does pay it, *it is the duty of the Auditors and Comptrollers to reject the item in the settlement of his account.* * * *" (Quoted 1 Law. Comp. Dec. 527.)

Furthermore, it had been held in the *Brashear* v. *Mason*, *Decatur* v. *Paulding*, and *United States* v. *Guthrie cases* that the first step in the process of determining the validity of a claim against the United States and the availability of an appropriation to pay same—that is, the action of the administrative executive officers—was discretionary and not controllable by mandamus. It would appear to be beyond question that the next step in the process—that is, the audit and settlement of the claim by the auditors and comptrollers and the final determination of the availability of an appropriation to pay the same (Act March 30, 1868, 15 Stat. 54, *In Re Reference*, 59 Ct. Cls. 813)—is discretionary.

The settlement of all claims against the Government for the Philippine Islands and the determination of availability of general appropriations with which to pay same being clearly a semi-judicial and discretionary jurisdiction and authority in the Auditor, mandamus cannot be used to require him to allow a claim payable therefrom and to countersign a warrant for the payment thereof. This Court said in *United States* v. *Lamont* (155 U. S. 303), at page 308, that:

"The duty to be enforced by mandamus must not only be merely ministerial, but it must be a

duty which exists at the time when the application for the mandamus is made. Thus in the case of *Ex parte Rowland*, 104 U. S. 604, 612, this court, speaking through Mr. Chief Justice Waite, said: 'It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one.'

"Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act, *Commonwealth* v. *Boutwell*, 13 Wall. 526, but it must *require* the act to be done. 'A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do.' *Reeside* v. *Walker*, 11 How. 272; see also *Secretary* v. *McGarrahan*, 9 Wall. 298; and the duty must be 'clear and indisputable.' *Knox County Commissioners* v. *Aspinwall*, 24 How. 376."

Moreover, Section 5 of the Administrative Code for the Philippine Islands, 1917, expressly provides that:

"The exercise of the permissive powers of all executive or administrative officers and bodies is based upon discretion, and when such officer or body is given authority to do any act but not required to do such act, the doing of the same shall be dependent on a sound discretion to be exercised for the good of the service and benefit of the public, whether so expressed in the statute giving the authority or not."

Even were the question an original one this law is conclusive that the Auditor performs discretionary duties in the settlement of claims for refund of customs duties and in the countersignature of warrants chargeable to general appropriations for the payment

of such claims. Under the unanimous decisions of this Court, commencing with *Marbury* v. *Madison* (1 Cranch 137), mandamus cannot be issued to control him in such discretionary action regardless of whether he erred therein. As said in *Riverside Oil Company* v. *Hitchcock* (190 U. S. 316):

> "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law [and the facts] was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction."

So here, the acts of Congress establishing the office of Auditor for the Philippine Islands defined the duties of such office in a manner to leave no other reasonable conclusion than that they are discretionary in character, and the legislature of the Philippine Government has made express provision to like effect.

Point V

The Supreme Court of the Philippine Islands has no greater jurisdiction in mandamus than have the courts of the United States.

Section 9 of the Act of July 1, 1902 (32 Stat. 691, 695), to temporarily provide for the government of the Philippine Islands, provided that "the Supreme Court and the Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the Government of said Islands, subject to the power of said

government to change the practice and method of procedure." Section 26 of the Organic Act provides that the Supreme Court of the Philippine Islands "shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by law."

The Spooner Amendment of March 2, 1901 (31 Stat. 910), provided that "All military, civil and judicial powers necessary to govern the Philippine Islands" shall, until otherwise provided by Congress, "be vested in such persons and shall be exercised in such manner as the President of the United States shall direct." His directions are contained in Section 515 of Laws of United States Philippine Commission (House Document No. 11, 57th Congress, 1st Session, 1901-1902), as follows:

> "* * * The Supreme Court shall have concurrent jurisdiction with the Courts of First Instance in all cases where an inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully excluded by such inferior tribunal, corporation, board, or person, and also shall have original jurisdiction over Courts of First Instance and Judges thereof wherever said Court or Judge unlawfully neglects the performance of a duty which is imposed upon such Court or Judge. The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in Sections 222, 223, 224, and 225 of this Code."

The foregoing defines the jurisdiction of the Supreme Court of the Philippine Islands, but confers no greater jurisdiction for the issuance of writs of mandamus than has been conferred upon courts of the United States, and it needs no argument to demonstrate that the latter have never had jurisdiction for the issuance of writs of mandamus to require the performance of discretionary acts in a particular manner.

Point VI

The fact that the law imposes duties upon and grants powers to the Auditor, the Governor General and the Secretary of War, which are judicial in character, does not vitiate such laws nor make such duties and powers any the less executive duties and powers.

The Court said in this regard in *Orchard* v. *Alexander* (157 U. S. 372, 378):

> "Stress is laid upon the words 'executive duties,' as though the approval of the evidence of settlement and improvement was not an executive duty, but a purely judicial act. This is a mistake. True, it involves the weighing of testimony and the exercise of judgment, but equally so do many administrative acts. * * * The approval of the evidence offered in respect to settlement and improvement is only quasi-judicial. It is as much an administrative as a judicial act."

Again this Court most pertinently stated in *Murray's Lessee et al.* v. *Hoboken Land and Improvement Company* (59 U. S. 272, 275, 280):

> "It must be admitted that, if the auditing of this account, and the ascertainment of its balance,

and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they (first auditor, first comptroller, and solicitor of the Treasury), or either of them, so connected with any such court as to perform even any ministerial duties which arise out of judicial proceedings.

* * * * * * * *

"That the auditing of the accounts of a receiver of public moneys (collector of customs) may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. * * * But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States* v. *Ferreira*, 13 How. 40."

An excellent discussion of this question by Secretary of the Interior Lamar (March 12, 1897) is found in the Pueblo of San Francisco case (5 Land. Dec. 483, 494), in which he said:

"There seems to be some misapprehension as to the meaning of the term 'executive duty.' The executive duties of any one of the Departments are such as are required of its officers in the administration of the law upon the subjects under its jurisdiction. They are not the less executive duties because they require in their performance the examination of evidence and the exercise of judgment thereon. All executive duties which are anything beyond the performance of ministerial acts, involve the exercise of judgment, such as

> an examination, decision and final judgment, but they are not judicial acts in the sense that they can only be the subject of review by judicial tribunals or upon a formal appeal to some higher judicial authority. There is hardly an act of any moment performed in an executive Department which would not, if such were the case, be taken from the supervision and control of its head."

Even if the matter was originally doubtful, its constitutionality has been settled by a hitherto unquestioned practice and construction to the contrary during the entire history of the United States. The powers of the Auditor in this case are no greater than those brought over from the Ordinance of September 26, 1778, *supra*, and conferred by the Act of September 2, 1789 (1 Stat. 65), on the Auditor and Comptroller of the Treasury and which were continued undiminished in the act of July 31, 1894, at the time the Organic Act created the office of Auditor for the Philippine Islands. See *Soule* v. *United States* (100 U. S. 8); *United States* v. *Babcock* (250 U. S. 328).

Point VII

The jurisdiction of the Collector to settle claims for refund of customs duties is subordinate to that of the Auditor.

Section 24 of the Organic Act expressly provides that the Auditor "shall examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government," and "audit, in accordance with laws and administrative regulations, all expenditures of funds," and that the Auditor is authorized "to communicate directly with any person having claims before him for settlement,"

the last clause showing clearly that his "audit" of expenditure includes "settlement" of claims.

That the jurisdiction of the Auditor in the performance of the foregoing duties applies to the actions of the Collector clearly is shown by the further provision of the foregoing section that the Auditor "shall perform a like duty with respect to all Government branches." That the jurisdiction of the Collector (considered by this Court in *Gsell* v. *Insular Customs Collector*) (239 U. S. 93), to allow claims for refund of custom duties payable from general appropriations in the Philippine Treasury is subordinate to that of the Auditor is shown by the further provision of said foregoing section that the decision of the Auditor "shall be final and conclusive on the executive branches of the Government."

Section 614 of the Code provides that "Insular revenue and trust funds shall not be withdrawn from the Insular Treasury except upon warrant," and Section 621 provides that:

> "No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an Officer of the Bureau of Audits thereunto authorized in writing by him."

While warrants may be drawn under Sections 616 and 1301 of the Code by the Collector for refund of customs duties, such warrants cannot be paid until the countersignature of the Auditor has been first had and obtained.

Thus it is that the accounts of or claims allowed by the Collector are required to be audited and settled by the Auditor and the warrants signed by the Collector for refunds of duties are valueless until countersigned

by the Auditor, and in both instances the plain and unambiguous terms of the statute make the Auditor's decisions final and conclusive on the Collector. We respectfully submit that it is difficult to conceive upon what theory all discretion is confined to the Collector and that the Auditor's duties in the premises are merely ministerial.

The provision of Act No. 355 of the Philippine Commission in 1902 authorizing an appeal from the decision of the Collector to the Court of Customs Appeal, changed in 1905 by Act No. 1405 to authorize such appeal to a Court of First Instance, and now carried in Sections 1383 and 1384 of the Code, in nowise affects the jurisdiction of the Auditor over the allowance of claims by an executive branch of the Government. In the Organic Act the Congress provided:

> "The laws now in force in the Philippine Islands shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States." (Section 6.)

> "The legislative authority herein provided shall have power when not inconsistent with this Act, by due enactment to amend, alter, modify, or appeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit." (Section 7.)

Thus the above provisions relating to appeal from the decision of the Collector, whether considered as in force at the time of the enactment of the Organic Act, or as amended, altered, or modified by the Philippine Legislature since that time, must square with

the provisions of the Organic Act, else they must fall. To construe them as carving out of all the claims against the Philippine Government a class of claims over which the Auditor has no control and concerning which he has merely a ministerial duty to perform, as the court below did construe them in this case, is to fly in the face of the express provisions of the Organic Act in defining the powers and duties of the Auditor, and providing that "he shall perform a like duty with respect to all Government branches."

A construction consistent with the provisions of the Organic Act and one that gives full effect to the provisions of the Tariff Law and the Code is the one to be sought, and its discovery presents no difficulty. Such a construction is that the Congress and the Philippine Legislature have consented that the Philippine Government may be sued in the Courts of First Instance, with an appeal therefrom to the Supreme Court of the Philippine Islands, on a claim for refund of customs duties, which claim has been passed upon by the Collector, when, *and only when,* the suit is commenced by way of appeal from the decision of the Collector, either by an aggrieved claimant or by the head of the Department (Secretary of Finance) on behalf of the Government, and when such appeal is taken within fifteen days after notice of the decision of the Collector. Thus when a suit is so commenced, and in no other manner is a suit on such a claim against the Government authorized, the determination of the validity of the claim is transferred from the jurisdiction of the Executive Department of the Government to that of the Judicial Department, over which the Auditor neither has nor claims any control. The decision of the court in such a case is a judgment,

not reviewable except by the Supreme Court, and payable out of the general and indefinite appropriation made by Act No. 357 of the Philippine Commission.

On the other hand, where such a claim is passed upon by the Collector but no appeal is taken from his decision as provided above, that is, no suit is commenced in the Court of First Instance in the manner and within the time provided as set forth above, the claim remains within the jurisdiction of the Executive Branch of the Government, and the decision of the Collector thereon, being the decision of an officer of the Executive Branch of the Government, is reviewable by the Auditor as are such decisions of the officers of all the executive branches, and is final and conclusive, except for the appeal to the Governor General and the Secretary of War provided by Section 25 of the Organic Act.

It is not reasonable to conclude that it was intended to confer on the Collector jurisdiction and authority largely in excess of that possessed at any time by collectors of customs in the United States. There has been no time in the entire history of the United States when the collector of customs could settle claims against an importer for customs duties or against the Government for refund thereof independently of the auditors and comptrollers of the Treasury. The original act of September 2, 1789, *supra*, provided that the auditor and comptroller should audit and settle claims and accounts relating both to *collections* and expenditures of money. The act of March 3, 1817 (3 Stat. 366), made such the duty of the First Auditor and the First Comptroller of the Treasury. The act of March 3, 1849 (9 Stat. 395), created

a Third Comptroller to take over such of the duties of the First Comptroller as related to customs accounts. The first paragraph of Section 7 of the Act of July 31, 1894 (28 Stat. 206), transferred to the Auditor for the Treasury Department the duty residing in the First Auditor to audit and settle "all accounts relating to the customs service." Furthermore, alongside of this audit and settlement of customs accounts by the auditors and comptrollers of the Treasury was an administrative audit of the accounts of the collectors. The act of March 2, 1799 (1 Stat. 642), which was carried into the Revised Statutes as Section 2626, quoted in the margin,[4] created Naval Officers. The title of these officers was changed by Section 523 of the Tariff Act of September 21, 1922 (42 Stat. 974), to Comptrollers of Customs and it was and is their duty to audit and check the accounts of the collector before any duties are collected or refunded and before the accounts reach the Auditor of the Treasury for settlement.

As hereinafter shown (p. 65), the Auditor did check and audit the account and approved the proposed assessment in this case before the duties were collected. This is in accordance with the century-old procedure in the United States and we contend that the Organic Act intended to and does confer on the Auditor like authority to audit and settle any claim for

[4] Sec. 2626. At ports to which there are appointed a collector, naval officer, and surveyor, it shall be the duty of the naval officer—

First. To receive copies of all manifests and entries.

Second. To estimate, together with the collector, the duties on all merchandise subject to duty, and no duties shall be received without such estimates.

Third. To keep a separate record of such estimates.

Fourth. To countersign all permits, clearances, certificates, debentures, and other documents, to be granted by the collector.

Fifth. To examine the collector's abstracts of duties, and other accounts of receipts, bonds, and expenditures, and certify the same if found right.

refund of customs duties which the Collector may approve.

Another analogy for the jurisdiction and authority which we claim for the Auditor over the Collector's decisions exists in the United States in the disposal of public land. Here we find the situation where the Act of July 1, 1864 (13 Stat. 332), provided that patent should issue to the entryman upon the approval of the survey by the Commissioner of the General Land Office. The Revised Statutes subsequently adopted gave the Secretary of the Interior general supervision over all such matters, without, however, repealing the former Act. Concerning this situation, Secretary and later Justice Lamar pertinently stated in his decision in the Pueblo of San Francisco case, *supra*, that:

> "The language of the act of July 1, 1864, (13 Stat. 332) which provides for the issue of a patent after the approval of the survey by the Commissioner of the General Land Office, is to be read in connection with the Revised Statutes subsequently adopted, placing all the business relating to the survey of private claims under the direction and supervision of the Secretary." (P. 495.)
>
> "The law places the Secretary at the head of the Land Department and makes it his duty to see that the laws of Congress respecting private land claims are carried out, and if knowledge comes to him in any way that the Commissioner has approved of any survey which is not authorized by law, he has authority, whether an appeal be taken or not, to review the action of the Commissioner, and to overrule it if it be erroneous. He cannot allow the government to be despoiled through what he deems to be a mistake in fact, or error in law, or any remissness on the part of any subordinate under him." (P. 497.)

This view was approved by this Court in *Lee* v. *Johnson* (116 U. S. 48, 52), in the following language:

> "So, in the present case, the Secretary of the Interior came to the conclusion, from the evidence returned by the register, that Johnson must be considered not as a *bona fide* homestead claimant, acting in good faith, but as one seeking, by a seeming compliance with the forms of law, to obtain a tract of land for his son-in-law, who had previously exhausted his homestead privileges, observing that the element of good faith is the essential foundation of all valid claims under the homestead law. Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands."

When we consider the official relation existing between the Collector and the Auditor, in so far as the settlement of claims against the government, and the determination of the availability of a general appropriation for the payment of same, are concerned, the foregoing analogy becomes strikingly applicable. The Collector is a subordinate executive officer, of the Department of Finance, subordinate to and under the executive supervision of the Secretary of Finance. (Section 83, Code.)

The Auditor occupies a unique position. He neither belongs to nor is he under any sort of supervision by any of the heads of any of the executive departments, created by the Philippine Legislature. On the contrary, he is a creature of Congress, appointed by the President of the United States, and standing separate

and apart from the six executive departments of the Philippine Government (Section 75, Code), and having exclusive, final, and conclusive supervision over these executive departments or branches, in so far as accounts of and claims against the Government are concerned, subject only to the general supervision of the Governor General. (Section 24, Organic Act; Articles I and IX, Chapter 26, Code.) Even this general supervision of the Governor General over the Auditor does not extend to the setting aside or reversal of any decision of the Auditor in the settlement of an account or claim against the government, for when on appeal to the Governor General the "latter disagrees with the Auditor's decision, he must forthwith transmit the matter to the Secretary of War for final decision." (Section 25, Organic Act.)

The fact that Congress itself saw fit to create this office, to prescribe its duties, powers and responsibilities, to provide that its incumbent be the appointee of the President of the United States, and the care with which Congress provided as to the finality of this officer's decisions, not reversible even by the supreme executive of the Islands, the Governor General, but only by the head of one of our own Executive Departments, the Secretary of War, show clearly the importance which Congress attached to the office, and that Congress intended its incumbent should occupy not only a unique but a powerful position with relation to the revenues and expenditures of the Philippine Government.

The reasons for this concern of Congress are obvious. The Organic Act was an experiment. Congress was dealing with a new proposition. A people, whom many believed only in their swaddling clothes in the

art of self-government, were being given a rather complete degree of local autonomy, to test and train them in the intricacies of self-government. Congress realized that under such circumstances safeguards were necessary, and among these none were more important than the safeguard over the revenues and expenditures of the new nation. Even our own Government has had such safeguards from its beginning, and the experience of a century and a half shows the need for their continued existence.

For this new government Congress evidently further realized that merely to provide it with a system of check and balance practically identical to our own was not enough. Until sufficiently trained to properly use that system, local control thereof was not desirable. Congress placed this control in the hands of an appointee of the President of the United States, the Auditor, and further provided that this control was subject only to an appeal to the Governor General and the Secretary of War, and that only the latter should have power of reversal.

It necessarily follows that the officers of the executive branches of the Philippine Government are subordinate to this officer in so far as the settlement of accounts and claims are concerned (see footnote 3, *supra.*) Hence we find the full application of the above analogy. And this is made doubly clear by some of the express provisions of the law. Section 1383 of the Code provides in connection with the decision of the Collector on protest:

> "The party aggrieved by the decision of the Insular Collector in any matter brought before him upon protest * * * may procure the cause to be removed for review in to the Court of First

> Instance. * * * unless the proper parties in interest shall procure the cause to be thus removed into Court for review, the action or decision of the Insular Collector shall be final and conclusive *against him.*" (Italics ours.)

Section 1384 then provides that if the Collector's decision is adverse to the Government, the Secretary of Finance may order the cause to be removed to the Court of First Instance.

We think it clear that the provision as to the finality and conclusiveness of the Collector's decision applies only to an aggrieved claimant. But should the Court find that it also applies to the Secretary of Finance, the situation is not changed so far as this case is concerned, for that which binds the Secretary of Finance in no way binds the Auditor, and the provision in the Organic Act that the decisions of the Auditor shall be final and conclusive on the executive branches of the Philippine Government shows that Congress did not intend to give the Collector greater jurisdiction, authority, and responsibility than that conferred upon collectors in the United States by making such decisions independent of all check and conclusive on the Auditor. The Tariff Law of 1909 came into existence long prior to the present government of the Philippines created by the Organic Act, hence its provisions must be construed in connection with those of the Organic Act, and thus the general supervision over expenditures given the Auditor in the latter applies to the decisions of the Collector over the former as fully as to the decisions of any other executive officer. This the Philippine Legislature recognized in passing Sections 1383, 1386, Code, *supra.*

Thus to paraphrase Secretary Lamar's language, as well as that of this Court in *Lee* v. *Johnson, supra,* we well may say that the law imposes upon the Auditor the responsibility to see that the laws of Congress and the Philippine Legislature respecting private claims are carried out, and if knowledge comes to him in any way that the Collector has approved a protest which is not authorized by law, he has the authority to review the action of the Collector, and to overrule it if it be erroneous. He cannot allow the Government to be despoiled through what he deems to be a mistake of fact, or error in law, or any remissness on the part of any subordinate under him. So far from exceeding his jurisdiction in so doing, he is exercising only that just supervision which the law vests in him in connection with claims presented to acquire money out of some general appropriation in the Insular Treasury.

Point VIII

An excellent illustration of this supervisory power and responsibility of the Auditor is found in a recent decision of the highest court of England.

The check and balance systems in existence in the United States through the Auditors and Comptrollers of the Treasury and in the Philippine Islands over administrative officers dealing with public moneys are not isolated instances. An excellent illustration of the system in England is disclosed by the recent case of *Rex* v. *Roberts* (1 K. B. 514-524 (1924), 2 K. B. 695, 729 (1924), (1925), A. C. 578, 618).

In order that the distinction between that case and the present case, in so far as the jurisdiction of the

courts is concerned, may be kept clearly in mind, it should be pointed out at the outset that the English case reached the court under an express statutory provision authorizing review by the courts on certiorari of any decision of the auditor disallowing or surcharging an account or item thereof. No such jurisdiction is conferred upon the courts in the Philippine Islands, except through the limited procedure provided by Sections 1383, 1384, and 1386 of the Code, which was not followed in the present case. However, this English case having reached the courts properly, the decision on the merits is, to say the least, interesting in the clarity and force with which the auditor's supervisory power and responsibility are defined and sustained.

By s. 247, Sub-s. 7, of the Public Health Act, 1875, it was provided that the district auditor "shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person. * * *"

By s. 62 of the Metropolis Management Act, 1853, it was provided that the Board of Works of municipal districts shall "appoint or employ or continue for the purposes of this act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and *may allow to such clerks, treasurers, surveyors, officers and servants, respectively, such salaries and wages as the board * * * may think fit.*" (Italic ours.)

The Board fixed the wages of its employees at a cer-

tain weekly sum largely in excess of the prevailing rates obtaining in private employment in that district and at rates which had been paid for a year or two previous, when the cost of living was higher, due to war conditions. The district auditor made a careful investigation of the facts and disallowed credit for payments made to the employees in excess of the prevailing local rates in private employment and charged the amount thereof against the members of the Board who had voted for the excess rates. The Board thereupon applied to the Divisional Court for a writ of certiorari to review the action of the auditor, and on a rule nisi the court unanimously discharged the rule and upheld the auditor. An appeal was taken to the Court of Appeals, where the Divisional Court was reversed. This case was then taken to the House of Lords, where the Court of Appeals was unanimously reversed and the decision of the Divisional Court affirmed, Lords Buckmaster, Atkinson, Sumner, Wrenbury and Carson writing separate concurring opinions.

The contention was made that the phraseology of the Metropolis Management Act of 1853, *supra*, which authorized the Board to employ servants and allow them such wages as it might "think fit" conferred exclusive discretion in the Board and that the auditor was without authority to disallow and surcharge any excess payments on the ground that same constituted an unlawful payment; that the auditor's jurisdiction was limited to determining the mathematical accuracy of the payments and whether same were made to the persons employed.

The case appears to have been elaborately argued in the House of Lords by MacMillan, K. C., and Sir

John Lithiby for the Auditor. They contended, among other things, that:

> "* * * a district auditor has a larger duty than, say, the auditor of a limited company (private business firm) whose function is to see that the items appearing in the balance sheet correspond with the vouchers. It is a part of his duty to protect the borough funds against improper expenditure and to determine whether any particular item of expenditure is unreasonable in the sense of being 'contrary to law.' 'Contrary to law' includes the whole ambit of proper administration * * *. The discretion conferred upon the council is not an uncontrolled discretion but must be exercised reasonably. The standard of reason is implicit in all the powers entrusted to a public body of this kind."

Each of the separate concurring opinions is an exhaustive consideration of the respective duties of administrative officers and auditors, but they are too long to quote here. Short extracts only will be given. Lord Atkinson said, page 597, among other things that:

> "If the business of the Auditor was merely to vouch the payment of the money paid in discharge of items ex facie legal, the audit would appear no protection whatever against the squandering of public funds."

Compare therewith views of Postmaster General Kendall (ante, p. 32), and Secretary of the Treasury Woodbury (ante, p. 25).

Lord Sumner said, page 601, that:

> "I put aside as absurd the contention that 'item' means only the name of the object of expenditure and is exclusive of the amount. The effect would be, that the auditor could not examine

at all into the prices paid for the goods purchased. Extravagant expenditure on permitted objects would receive an absolute charter of immunity, and a statutory body, strictly tied up in one dimension, would be free to move to infinity in another. At this point, therefore, we find an enactment, which binds the council to submit to the auditor's examination all their expenditure and binds him to examine the whole and every part of it to test its legality, and to disallow any and every expenditure found to be contrary to law."

He further said with respect to the respective authority of the Board, page 602, and of the auditor, page 604:

"My Lords, the section imposes a duty coupled with a power. In the case of an actor, who is the creation of the law, it is from some provision of the law, express or implied, statutory or otherwise, that each and every power lawfully used must somehow be derived. In the case of a section conferring a statutory power on one person there is no necessity to read into it an intention to limit a statutory power conferred on some other person, nor is there any need to imply an exemption of the exercise of the power, which the section itself gives, from subsequent review under powers to that effect given by another and, in this case, a later Act. Language, may, of course, have been employed of a scope so wide as to lend to this result, but prima facie empowering words have had their due effect and are spent, when the power has been effectually conferred."

* * * * *

"The purpose, however, of the whole audit is to ensure wise and prudent administration and to recover for the council's funds money that should not have been taken out of them. If, having ex-

amined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor further found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure itself would not be 'contrary to law' and could not be disallowed. Bad faith admittedly vitiates the council's purported exercise of its discretion, but the aduitor is not confined to asking, if the discretion, such as it may be, has been honestly exercised. He has to restrain expenditure within proper limits. His mission is to inquire if there is any excess over what is reasonable. I do not fiind any words limiting his functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism. The breach in the words 'as they may think fit,' which the admitted implication as to bad faith makes, is wide enough to make the necessary implication one both of honesty and of reasonableness. It might be otherwise, if the expressed words were to be read as absolute and unqualified, but if they are to be read as subject to some qualification, I think that qualification must be derived from the purpose of the statutory audit, which is the protection of the ratepayers' pockets and not the immunity of spendthrift administration. Next, in the case and for the purpose assumed, the auditor, when he reviews the accounts, is entitled and bound to use his own judgment as to the wages that would be reasonable under the circumstances. He must do so, in order to measure from that datum the excess of the wages paid, and to decide if the excess is so great as to evidence mala fides. So it will be also with the Courts of law on appeal. If in the case of bad faith the auditor is capable of finding a reasonable amount and is bound to proceed to do so, I find no words in the section which, on a sound construction, pre-

> clude him from doing the same thing when good faith is present, and I think that in both cases the reasonableness of the amounts is a subject for his review."

The language of the Organic Act that the Auditor shall "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source" and that such settlements "shall be final and conclusive upon the executive branches of the Government," when coupled with the history of the accounting system in the United States, leaves no room for doubt but that the Auditor has the jurisdiction and the duty to audit and settle claims approved by the Collector for refund of customs duties. Since there is no provision of law to review by certiorari on the merits the decisions of the Auditor as in the English case of *Rex* v. *Roberts,* and since a writ of mandamus cannot be used as a writ of error for such purpose (*Work* v. *Rives, supra*), it would appear to conclusively follow that the judgment of the court below is erroneous and should be reversed.

Point IX

To limit the term "account" as used in the Accounting Law and in Section 24 of the Organic Act to the meaning given it by the court below is contrary to the settled construction of statutes of the United States with which the use of the term is assimilated and would destroy the accounting system created by Congress for the Philippine Islands.

The court below held that because the claim of the Company in this case consisted of only one item which

grew out of one transaction, and the only question involved being the legality of the claim, it was not an account "within the definition of the word." (R. 74.) Presumably the court meant that the claim was not an account within the meaning of the Accounting Law and Section 24 of the Organic Act.

The court quoted in support of this holding from the case of *Powers* v. *United States* (18 Ct. Cls. 275), as follows:

> "An account is something which *must* be adjusted and liquidated by arithmetical process." (Italics ours.)

An examination of this case clearly shows that it sustains no such proposition as the court below attributed to it. In the first place the quotation is inaccurate in a very important respect. What the Court of Claims actually said was:

> "An account is something which *may* be adjusted and liquidated by arithmetical computation." (Italics ours.)

Further, when the nature of the question before the Court of Claims and the other language used by that court are considered, there is furnished an excellent illustration of the danger of selecting a single sentence from a decision and citing it to sustain some proposition. The matter before the court in that case was a claim for unliquidated damages. The Secretary of the Interior, to which Department the claim initially was presented, concurred in the opinion of his subordinates that the claimant was entitled to some damages, but expressed the opinion that the Depart-

ment had no authority to adjust such damages, and proposed to submit the case to Congress. The court concurred in this view, holding and *only holding* that a claim for unliquidated damages is not an account within the meaning of the accounting laws.

Again, in the citation of the court below of the definitions of "account" from Words & Phrases (R. 73-74), we find a selection only of definitions suitable to the court's view. In the same work (Words & Phrases), definitions of "account" within the terms of which the Company's claim readily falls are easily found. For example:

> "The word 'account' has various meanings and shades of meanings, and is used in various ways. Where used alone, without words of limitation, extension, qualification, or explanation, it is equivalent to the word 'claim' or 'demand' * * *. *Southern Kan. Ry. Co.* v. *Gould*, 24 Pac. 352, 44 Kan. 68." (P. 88.)

That mutuality is not necessary:

> "It is none the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demand of debits and credits, provided the contract arise out of charges express or implied, or from some duty imposed by law. *Nelson* v. *Posey County*, 4 N. E. 703, 105, Ind., 287." (P. 89.)

That more than one item is not necessary:

> "An account, within Code, Sec. 158, declaring that a party may demand a bill of particulars when an account is alleged in an adverse pleading,

> may be of a single entry or of a great number, and for a short or long period. *Dowdney* v. *Volkening*, 37 N. Y. Super. Ct. (5 Jones & S.) 313, 318." (P. 90.)

The court below then quotes from page 90 (Words & Phrases):

> "The stating of a single demand, the amount and validity of which has become unalterably fixed is not an account within the meaning of Comp. St. 1897, c. 18, sec. 23, requiring the board of county commissioners to examine and settle all 'accounts.' "

Here again we have a shot in the dark; but, even so, the court below evidently overlooked or failed to give proper weight to the fact that in the above case the court held that not only the amount but the *validity* of the demand must have become "unalterably fixed." Had the question of the validity of the claim in the present case been undisputed, there would have been no suit.

The above quotation comes from the case of *Perkins County* v. *Keith County* (78 N. W. 630). Perkins County was formed from a portion of Keith County. Pursuant to statute the County Boards of the two counties meeting together proceeded to divide the property, and adjust the liabilities of the parent county. A final adjustment, agreed to by both boards, fixed an amount due and owing from Perkins County to Keith County in a definite sum. Perkins County thereafter refused to pay this sum, and in this suit contended that the claim was subject to the examination and settlement of its County Board. The court

held that the board already having acted upon and agreed to the amount, there remained nothing for them to examine, settle, adjust or allow, saying:

> "It would be a work of supererogation for the Commissioners to examine and allow a claim which, under the authority of the statute, they had already fully examined and legally allowed."

The court cited *Kemmerer* v. *State* (7 Neb. 130), where it was held that when the compensation of a public officer is definitely fixed by law, the duty of the County Board in connection with his claim based upon official service is ministerial merely, "because the board has no judgment or discretion to exercise in the matter." This was precisely the point involved in the case of *Smith* v. *Jackson* (246 U. S. 338), upon which the court below relied, and which will be distinguished hereinafter. (pp. 69, 73.)

Were it not for the fact that the court below urged it so confidently, no authority would be deemed necessary to refute the proposition that a claim against the Government containing but a single item is outside the jurisdiction of the Auditor. Its mere statement seems a sufficient refutation. But neither is authority lacking.

There can be no doubt that the Congress intended to use the term "accounts" in Section 24 of the Organic Act, *supra*, in the same sense as it is used in Section 236, Revised Statutes, as amended by the Act of July 31, 1894 (28 Stat. 205, 211), relating to the accounting officers of the United States, with respect to whose duties and powers the duties and powers of the Auditor are assimilated. So, too, must the Philippine Legislature have had in mind the same

meaning when using the term in dealing with the same subject-matter in the Accounting Law, *supra.*

An examination of the Act of July 31, 1894, *supra,* and Section 236, Revised Statutes, is sufficient to show that *claim* and *account* are used interchangeably. So, too, in the administration of these laws the settlement of an account and the settlement of a claim mean one and the same thing. (2 Ops. Atty. Gen. 518, 625. 1 First Comp. Dec. (2 Ed.) 512.) And this has been recognized by the Courts. *McKnight* v. *United States* (13 Ct. Cls. 292); *United States* v. *Harmon* (147 U. S. 268).

Mutuality is not necessary to constitute an account. There have been isolated cases that confine *account* to its derivative meaning, but common business practice, as well as the great weight of judicial authority, is to the contrary. The fact that the Government had no claim against the Company was immaterial. The claim of the company against the Government constituted an account within the jurisdiction of the Auditor.

> "An 'account' is a general term which covers any item of indebtedness, by contract, express or implied. 1 Cyc. 362; 1 Am. & Eng. Ency. Law, 434, and notes; 1 Words & Phrases, 87 Cave, Use of Wallace V. Burns, 6 Ala. 780; Morrisette, *Extr.* v. *Wood,* 128 Ala. 505, 507, 508, 30 South, 630."
>
> *Dees* v. *Self Bros.* 51 So. 735, 736.

> "While the primary idea of account—computatio—implies matters of debit and credit, the adjustment of which will show a balance to be accounted for by one party or the other, 'it is not necessarily restricted to several distinct items nor

is it the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demands of debit and credit, provided the charges arise out of contract, express or implied, or some duty imposed by law.' 1 Enc. of L. and P. 362, *Nelson* v. *Posey County*, 105 Ind. 287, 4 N. E. 703."

McMullen Co. v. *Strother* (136 Fed. 295, 302).

Any conclusion that a single item does not constitute an account is contrary to the settled construction of the law with respect to the auditing of public accounts. Comparatively few of the millions of claims audited and settled by the accounting officers of the United States since 1789 consist of more than one item on a public voucher.

Furthermore, as pointed out by President Taft's Commission on Economy and Efficiency (House Document 854, 62d Congress, 2d Session, pp. 64, 94) the primary function of the accounting officers of the United States is the determination of availability of appropriations and only incidentally are they concerned with the abstract legal merits of a claim or account. Unless the appropriation is available for a proposed payment, the relief must be sought ultimately in the Congress for an available appropriation. This question of availability of the appropriation must be determined whether the claim consists of one item or of one hundred items.

Point X

To limit the term "audit" as used in the Accounting Law and Section 24 of the Organic Act to the re-

stricted meaning given it by the court below denies the Auditor the essential powers conferred upon him by Congress.

The court below laid great stress on the fact that the Organic Act provides that the Auditor shall:

> (a) "* * * examine, audit and settle all accounts pertaining to the revenue * * * of the Philippine Government * * *;" and
> (b) "* * * audit in accordance with law and administrative regulations, all expenditures of funds * * * pertaining to * * * the Government." (R. 73.)

The court say with reference to these provisions:

> "By the language of the act, the defendant is authorized to 'audit, examine and settle accounts.' As to the 'expenditures of funds pertaining to the Government,' he is authorized to 'audit in accordance with law and administrative regulations.'
> "It will be noted that the words 'examine' and 'settle,' which are included in, and made a part of, paragraph (a) are omitted in paragraph (b). This is significant." (R. 73.)

The court then argue (R. 73-75) that the Company's claim not being an account, did not fall under (a) above, and, therefore, the Auditor had no authority to "examine" or "settle" the same, but that his duty in connection therewith was confined to an "audit in accordance with law and administrative regulations," and that his powers thereunder were limited to the following:

"1. Ascertain that the protested claim has in fact been made;

"2. That the protest was made within due time;

"3. That no appeal has been taken from the decision and that it is, therefore, final;

"4. That the amount for which the warrant is drawn corresponds to the amount paid under protest;

"5. That there is money available in the Treasury with which to meet the payment;

"6. That the claim is one for refund of duties on repairs made abroad." (R. 75.)

We think from what has heretofore been said that such conclusion finds no support in the law. The view of the court that the authority is limited to determining whether "there is money available in the Treasury with which to meet the payment" would impose on the Auditor nothing more than jurisdiction to make a physical determination that there is money in the Treasury out of which claims for refunds of customs duties can be paid, a purely ministerial determination of a physical fact. In this the court erred, for the question for the determination of the Auditor is not whether there is money available in the Treasury, but whether there is an appropriation available. The determination of the availability of an appropriation for the payment of this claim is far from a ministerial act, for it involves a determination as to whether the claim was within the object and purpose for which the appropriation was made, viz., whether the customs duties actually had been *erroneously* and *illegally* collected.

This, however, is not the full extent of the errors of the court below, for their decision is to the effect that so far as expenditures—that is, the payment of

claims against the Government—are concerned, since the Auditor is not expressly authorized in the Organic Act to "examine" and "settle" such claims, but only to "audit" the same, his authority with reference thereto is merely that of an accountant. If this is true Congress has failed lamentably in providing for the Philippine Government a system of check and balance found so necessary in our own Government, and it may be here added, in the language of Lord Atkinson in *Rex* v. *Roberts, supra,* that such a construction of the audit would make it "no protection whatsoever against the squandering of public funds" and finds no support in the statutes, history, or decisions, with respect to the functions and duties of the auditors and comptrollers of the United States Treasury.

A description of the procedure prescribed by law and regulations and followed in the assessment and collection of the customs duties in this case will prove helpful in showing full application of the check-and-balance system, and in pointing out the true relation existing between the Collector, a collecting and accountable officer, and the Auditor, the accounting officer.

Upon the return of the steamship *Venus* to the Philippines after its repair in Hongkong, the Company as agent and operator thereof filed with the Collector a declaration supported by the consular invoice showing the value of the materials and labor that were employed in the repairs. The Collector in his capacity as Collector of Port at the City of Manila then assessed the customs duties, based upon the data indicated in the said declaration and consular invoice. After making the assessment, the declaration and the consular invoice (which form the voucher) were submitted to the

Auditor for examination, audit, and approval. The declaration and invoice having been returned approved by the Auditor, the Collector proceeded to collect the amount assessed as approved. The collection of the assessment having been effected, the Collector returned the duplicate of the papers (which constitute the voucher) to the Auditor for his record and information that payment had been made.

These transactions constitute in part the rendition of accounts which the Collector as an accountable officer is in duty bound to make to the Auditor. When he presented the declaration and the consular invoice to the Auditor for examination, audit, and approval of the assessment of duty, the Collector thereby recognized, as he is required by law to do, the authority of the Auditor to check his collection accounts in order to see whether the customs duties due on the repairs of the steamship *Venus*, as itemized in the declaration, was fully, correctly, and legally assessed. A true and conscientious examination and audit of such account carries with it the duty and responsibility, not only to ascertain that the assessment is mathematically correct, but also to see that no dutiable item in the declaration is omitted.

We respectfully submit that it would be ridiculous to permit the application of the system to stop here. After painstaking care the Auditor would see to it that the proper amount of customs duties was paid, and covered into its unappropriated fund in the Insular Treasury but that done, must then stand by and see that which had been collected refunded, powerless to prevent that which he believes to be wrong; indeed, compelled, if the decision of the court below is to stand, to lend his aid to such wrong by countersigning the warrant upon which the refund is

paid. It is submitted that Congress never intended the powers of the Auditor thus should be limited; that Congress never intended to create an office the incumbent of which must see that the officers of the executive branches collect all moneys due the Government, but should have no supervision or control, except as to matters of arithmetic, over the expenditures of Government funds by the same officers. The need for supervision is always much greater on the spending end than on the collecting end.

It is here that the court below failed to comprehend the full powers of the Auditor, and to take into consideration other portions of the law which make this point clear. Section 25 of the Organic Act provides in pertiment part:

> "That any person aggrieved by the action or decision of the Auditor in the *settlement* of his account or *claim* may * * * appeal * * * to the Governor General." (Italics ours.)

Section 584 of the Code contains the following:

> "The authority and powers of the Bureau of Audits extend to and comprehend all matters relating to accounting procedure, including * * * the examination and audit of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches."

Section 587 provides, *inter alia:*

> "The Auditor may communicate directly with any * * * person * * * having a claim before him for settlement."

Section 621 is as follows:

"No Insular warrant shall be paid by the Treasurer, until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

The foregoing seems sufficient to demonstrate, without more, the interchangeable use of *account* and *claim*, as well as the comprehensive meaning intended for the term "audit," and that the Auditor's supervision over claims against the Government includes the power of settlement, which in turn includes allowance, modification, rejection, or disallowance. Such has always been the practice in the United States as shown by the following:

"* * * When an account or claim comes before the accounting officers for settlement or allowance, by whomsoever it may have been recommended, they have not only the power, but that it is their imperative duty, from which they can not escape without a violation of their official oaths, *to inquire into its legality, and if they deem its allowance illegal to reject it.* * * * In the system of accountability prescribed by our laws, the authority to judge of the legality of expenditures made by or under the direction of the heads of Departments, was conferred on the Auditors and Comptrollers with the design and intention that it should be exercised, and should operate as a *check upon unnecessary and improvident expenditures.*" (Italics ours.) (First Comp. Dec. Lawrence, 1880, Vol. 1, 2d Ed., p. 512.)

"It may be conceded that the Commission's [Interstate Commerce Commission] control of its appropriations is as full and complete as is that of the head of any of the Departments of the Government over the funds placed at his disposal. *But such control does not extend to the auditing*

of the accounts for the expenditure of such appropriations. Items of expense bearing the approval of the heads of Departments are disallowed every day by the accounting officers. The latter are required to examine accounts to see if the expenditures are allowed by law." (Italics ours.) (Comp. Dec. Vol. IV, pp. 269-270.)

This Court recognized the above authority of the accounting officers, as well as the interchangeable use of *account* and *claims*, in *United States v. Lynch* (137 U. S. 280, 284). And it was so held by the Court of Claims in *Longwill* v. *United States* (17 Ct. Cls. 291):

> "The Accounting officers of the Treasury are in duty bound to scrutinize claims and accounts with great care, as is their custom, and it is the undoubted right of those who have authority to decide thereon to reject in whole or in part, as their judgment dictates, all those claims which they have reasonable cause to suspect are tainted with fraud or to which they believe there may be substantial defects in law or as to the validity of which they are in doubt."

Point XI

The case of Smith v. Jackson (246 U. S. 338) distinguished.

The court below placed great weight on *Smith* v. *Jackson* (246 U. S. 338), wherein was sustained the action of the United States Court for the Canal Zone in issuing a writ of mandamus to the Auditor of the Panama Canal Zone. There the Congress had appropriated in the Act of March 3, 1915 (38 Stat. 883), for "salaries of district judge $6,000," etc. It was

held in that case that the payment of the salary as appropriated by Congress in a fixed and definite sum to a definite person was a ministerial duty. That is not the situation here, for there was no fixed and definite sum appropriated by the Legislature of the Philippine Islands as a refund to the Company of customs duties. The question whether appropriations made in general terms to make refund of customs duties erroneously or illegally collected and not considered by the Court of First Instance were available to make refunds to the Company depended on the law and facts of the Company's claim and was exclusively committed to the sound discretion of the Auditor. The court below failed to distinguish between such cases as *Smith* v. *Jackson*, *United States* v. *McVeagh*, and *Houston* v. *Ormes*, *supra*, where Congress had appropriated a specific sum to be paid to a specific person or officer and the payment of which involved the performance of a ministerial duty, and such cases as *Brashear* v. *Mason*, *Decatur* v. *Paulding*, *United States* v. *Guthrie*, and *United States* v. *Lynch*, *supra*, where Congress had appropriated a general sum for a particular class of expenditures and the availability of which appropriation to pay any particular claim was held to be a matter of judgment and discretion.

A full statement of the facts in the *Smith* v. *Jackson* case is contained in 241 Fed. 747. The attention of the Court is particularly invited to the sections of the Code for the Canal Zone (quoted on page 752 of said volume), as to the authority of the court for the Canal Zone to issue writs of mandamus. This authority was exceedingly more comprehensive than that conferred upon United States courts generally. See

Barber v. *Hetfield* (4 Fed. (2d) 245), and *Emerson* v. *Baker* (3 *id.* 830), where this was pointed out. Also the Auditor for the Panama Canal Zone was not an accounting officer of the Treasury within the meaning of the Ordinance of 1778, Act September 2, 1789, March 3, 1817, July 31, 1894, *supra*, with whose duties those of the Auditor for the Philippine Islands are assimilated by Section 24 of the Organic Act. In fact, the duties of the Auditor for the Panama Canal Zone are analogous to those of the Collector in this case. *The Canal Zone Auditor is an administrative examiner of accounts such as is common to all of the departments and establishments of the Government, and the claims and accounts examined by him were required by the act of October 22, 1913 (36 Stat. 209), to be thereafter settled and adjusted by the Auditor for the War Department, one of the former auditors of the Treasury. Not so as to the settlements of the Auditor for the Philippine Islands. They are final unless reversed on administrative appeal as provided in Section 25 of the Organic Act.*

There has been no case in the Supreme Court of the United States since the foundation of the Government (and the offices of auditors and comptrollers of the United States have been in existence throughout that period) where said Court has sustained the issuance of mandamus or injunction against them. The fact that until 1855 there existed no remedy whatever at law against the United States was not sufficient to permit such action and, as heretofore shown, the situation in the present case with respect to suits against the Philippine Government is the same as that prior to 1855 with respect to suits against the United States.

The reason for the rule is clear. The Constitution

of the United States confers exclusive control over public money to the Congress, and as pointed out by Ex-President and now Chief Justice, Taft, in his book on *Our Chief Magistrate and His Powers,* the Congress has committed exclusive authority and jurisdiction (unless otherwise specifically provided by law) to the comptrollers to determine the availability of general appropriations to pay claims. The reasons for limitations on the expenditure of appropriations are considered in the quotation in the margin.[5] The Congress has also established courts of inferior jurisdiction and conferred upon them authority to hear and

[5] "It is somewhat difficult in all cases to discover the reasons for the existence of particular limitations of discretion. In some instances a study of the history of the service for which the appropriations are granted will reveal the fact that a limitation was imposed in order to prevent an abuse of discretion which had been discovered as the result of an investigation of the service by a committee of Congress. Such, for example, is the origin of the limitation in the appropriation for the Coast and Geodetic Survey, preventing the use of the appropriation for general expenses for the pay of subsistence of officers of the service permanently stationed at Washington.

"Sometimes, however, it is undoubtedly true that the peculiarities of particular appropriations are due to the peculiar characteristics of the services for which the appropriations are made. It is in this way that the differences between the Army and Navy appropriations may be explained. * * *

"Sometimes also we find that the abuse which a peculiar limitation has been intended to remedy has been of a power granted in the appropriation which is peculiar to the service to which it is granted. Thus the limitation referred to, which is found in the Coast and Geodetic Survey appropriation, was made in order to prevent the abuse of the rather peculiar provision in that appropriation authorizing commutation of subsistence to officers of the field force. The question naturally arises whether the conditions of the Coast and Geodetic Survey are so peculiar as to justify the grant of this power when it is not granted to a service so similar in character as the Geological Survey.

"A study of the peculiarities of particular appropriations can hardly fail to force the conclusion that some of the peculiarities in appropriations can not be explained by peculiarities in the services to which they are granted, and that they are due either to the representations which have been made to the committees of Congress by heads of the services concerned or to the attitude which the committees have taken in view of the political and other conditions present at the time the appropriation was granted. * * *" (House Document No. 854, 62d Congress, 2d Session, pp. 110, 111.)

determine certain claims against the United States and has provided expressly how the judgments may be paid. There is no overlapping of the jurisdiction of such courts and the comptrollers and both are subordinate to the Congress with respect to public money. The same situation exists with respect to the Auditor for the Philippine Islands and the Supreme Court of said Islands, with the difference that (except where an appeal from the Collector to the Court of First Instance as provided by law has been perfected) said courts have had no jurisdiction conferred on them to hear and determine any claims against the Philippine Government or to determine the availability of general appropriations to pay such claims. Such jurisdiction is exclusively that of the Auditor, subject to appeal, as provided in Section 25 of the Organic Act, to the Governor General and to the Secretary of War, or to the Legislature of the Philippine Islands in accordance with the principles stated in *Reeside* v. *Walker, Brashear* v. *Mason, and Decatur* v. *Pauling, supra.*

Point XII

To grant a writ of mandamus where the law provides a plain, speedy and adequate remedy is contrary to the decisions of this Court.

The court below relied upon the decision in *Compania Generale de Tabacos* v. *French et al.* (39 Phil. 34), in denying that the Company had a plain, speedy and adequate remedy at law in this case in the appeal to the Governor General and Secretary of War provided by Section 25 of the Organic Act. (R. 81.) The sole question in that case was whether the Auditor had

authority to settle and adjust a claim for unliquidated damages. The court held that he had no such power, and to that extent its decision is in accord with *Powers* v. *United States, supra.* However, the immense amount of dicta in which the court indulged, including that cited by the court below, was neither necessary nor was it in accord with the decisions of this Court referred to throughout this brief. The dicta appear to have been merely paving the way for the erroneous assumption of a jurisdiction by that court not conferred upon it by any law, which the court ultimately consummated in the present case, contrary to the unanimous holdings of this Court and of other courts of this country throughout more than a century.

We submit that the Auditor was performing in this case semi-judicial duties involving judgment and discretion and that his acts are not subject to review on a petition for writ of mandamus, and that in any event the law afforded a plain, adequate, and speedy remedy preventing the granting of mandamus.

Section 25 of the Organic Act provides that:

> "Any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authority relied on for reversing such decision.
>
> "If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal and transmit it to the auditor, and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor he shall forthwith transmit his ground of

> disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive."

This remedy is plain, speedy, and adequate, and where such a remedy exists there can be no resort to extraordinary judicial proceedings, *Bayard* v. *United States, ex rel White* (127 U. S. 246); *Poindexter* v. *Greenhow* (114 U. S. 270); *Bailey* v. *George* (259 U. S. 16); and particularly is this true where the law provides administrative appeals and such have not been taken, as here. *Ekiu* v. *United States* (142 U. S. 651); *United States* v. *Sing Tuck* (194 U. S. 161); *Baltimore & Ohio Railroad* v. *Pitcairn Coal Co.* (215 U. S. 481). If we substitute the Governor General and the Secretary of War, as provided in Section 25 of the Organic Act, for the Interstate Commerce Commission, the following language of Chief Justice White in the *Pitcairn case* is controlling:

> "We see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions."

No appeal was taken to the Governor General in this case. In fact, the proceedings below were instituted before the Auditor had finally acted on the request of the Collector that he countersign the warrant for refund of the customs duties. (R. 16, paragraph 20 of Answer.)

Point XIII

The Government for the Philippine Islands is the real party in interest and a necessary and indispensable party.

The Auditor has no personal interest in the money in the Insular Treasury. Such money is the property of the Government for the Philippine Islands. A proceeding against the Auditor because of his official position and concerning the public money in the Insular Treasury is a proceeding against the Government for the Philippine Islands. The rule is settled that under such circumstances jurisdiction must be determined by the real and not the nominal parties in interest, and that where the Government is the real party in interest and cannot be made a party, the proceedings must fail. *Wells* v. *Roper* (246 U. S. 335); *Louisiana* v. *McAdoo* (234 U. S. 627); *Oregon* v. *Hitchcock* (202 U. S. 60); *United States, ex rel Goldberg,* v. *Daniels* (231 U. S. 218).

This suit does not rest upon an abuse of power by the Auditor, and the case of *Goltra* v. *Weeks,* decided June 7, 1926, by the Supreme Court of the United States is not apropos. The suit is an interference with the official discretion of the Auditor, and we submit that the Government for the Philippine Islands as the real party in interest is an indispensable and necessary party.

Point XIV

The Governor General and the Secretary of War are the superior officers of the Auditor and are indispensable and necessary parties.

By Section 24 of the Organic Act the office of the Auditor is "under the general supervision of the Gov-

ernor General," and under Section 25 of said act the decisions of the Auditor are reviewable by both the Governor General and the Secretary of War. It would seem to be clear that while the Auditor is appointed by the President, he is the subordinate of both the Governor General and the Secretary of War in the settlement of accounts. If this be true, it necessarily follows that under the decision of this Court in *Webster* v. *Fall et al.* (266 U. S. 507), the judgment of the court below must be reversed because the Governor General and the Secretary of War were not made parties to these proceedings and are necessary and indispensable parties.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court for the Philippine Islands is erroneous and should be reversed with directions to dismiss the petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1926

No. 316

Ray P. Wardon, *Auditor for the Philippine Islands*, Petitioner,

v.

Emerson Abe Dibert, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

REPLY BRIEF FOR PETITIONER.

J. R. Hamilton,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 316

BEN F. WRIGHT, *Auditor for the Philippine Islands, Petitioner,*

v.

YNCHAUSTI AND COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

Our main brief on behalf of the Auditor went into considerable detail relative to the history, functions,

and decisions applicable to the accounting officers of the Treasury. This was done so as to conserve the time of the Court in the matter of research as to such history, functions, and decisions, particularly as this is the second time in the 137 years' history of the United States, that an accounting officer of the United States has been before this Court in his official capacity—the first time having been in *United States v. Lynch*, (137 U. S. 280). As shown in our main brief (p. 71), the case of *Smith v. Jackson* (246 U. S. 338) did not concern an accounting officer of the United States but an administrative examiner of accounts and claims. Smith's accounts were required by the Act of October 22, 1913 (36 Stat. 209), to be settled and adjusted by the Auditor for the War Department, subject to appeal, as provided in the Act of July 31, 1894 (28 Stat. 208), to the Comptroller of the Treasury. The functions of the Canal Zone Auditor were analogous to those of the Collector in this case.

We believe that it will be of assistance to the Court to analyze the argument of counsel for the Company, and, in order to do so, we shall show: (1) The inapplicability of the principal decisions cited on behalf of the Company to the question here at issue; and (2) The fallacy, as we believe, of their argument that the Auditor performs only ministerial duties with respect to claims for refund of customs allowed by the Collector, or, to state it differently, that the Collector is the sole executive official of the Philippine Islands whose accounts are not subject to audit and settlement by the Auditor and on whom the Auditor's decisions are not final and conclusive.

I.

THE INAPPLICABILITY OF THE PRINCIPAL DECISIONS CITED ON BEHALF OF THE COMPANY TO THE QUESTION HERE AT ISSUE.

The first case cited by counsel for the company is *United States v. Jones* (18 Howard 92) (p. 12). It will be conceded that if a statute, in specific, terms reposes all discretion in the administrative executive officer, the accounting officers are not charged with the "burden of responsibility cast upon" such administrative officers "of revising the judgments, correcting the supposed mistakes, or annuling the orders of the heads of departments." We deny, however, that the statutes in this case repose all discretion in the Collector.

The *Jones case* arose in 1856, out of a payment on order of the Secretary of the Navy, of a sum of money to a Navy officer who was injured while on leave, that is, while not on duty, in Paris, and for the purpose of paying the officer's hospital expenses. The accounting officers of the United States ruled that the payment was improper, being prohibited by the Act of March 3, 1835. Suit was brought against Jones in the former District Court of Washington, which upheld the payment and upon appeal to this Court, the judgment was sustained, two justices dissenting.[1] There appears to have been no express provision of law

[1] Hotchkiss, *Judicial Work of the Comptroller of the Treasury* (p. 19), says:

"This principle was never fully accepted by the officers of the Treasury. In 1856, Secretary Guthrie had instructed the fourth auditor that it should be held to apply only to the particular case and not considered as changing the law (cf. Renick E. I., in Pol. Sci. Quarterly vi. p. 277). The Act of 1868 (15 Stat. 54), was a statutory confirmation of a principle already established in actual practice."

making the order of the Secretary of the Navy conclusive on the accounting officers of the Treasury, and it is instructive to compare with the language quoted by counsel from the majority opinion of the Court, the views of Secretary Alexander Hamilton, Secretary Woodbury, The House Committee on Revision of the Laws, President Taft, the President's Commission on Economy and Efficiency, and of Postmaster General Kendall, as well as the views of the House of Lords in *Rex v. Roberts,* 1925 A. C. 578 (quoted at pages 23, 25, 26, 27, 28, and 32, 53-56, respectively, of our main brief). The discretion conferred on the Board in *Rex v. Roberts,* was much greater, in the payment of salaries to its employees, than was the discretion conferred on the Secretary of the Navy in the payment of the hospital expenses of Navy officers incurred while on leave.

However that may be, the Congress, by act of July 15, 1870 (16 Stat. 334), which was carried into the Revised Statutes as Section 1586, expressly adopted the views of the accounting officers of the Treasury in the *Jones case,* by the provision that:

> "Expenses incurred by any officer of the Navy for medicines and medical attendance shall not be allowed unless they were incurred when he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had."

Thus it was that another limitation on adminstrative discretion in the expenditure of appropriated moneys was placed in the law (see footnote, page 72 of our main brief). The Congress delegated to the accounting officers the appropriation

control which had been denied in the *Jones case.* (See footnote, p. 28 of our main brief.) *This is not a question of the relative merits of control by administrative officers or by accounting officers over appropriations. It is a question of legislative control over the expenditure of public funds and the placing of the immediate responsibility therefor in the accounting officers of the United States, and the Auditor for the Philippine Islands,* who are wholly unconnected with the spending agencies and who may be presumed to have no personal interest in the settlement of the claims and accounts. Furthermore, it is a centralized control, its theory being well expressed by Shakespeare, in King Lear (Act II, Sec. 4, l. 243) as follows:

> "How, in one house, should many people under two commands hold amity? 'Tis hard; almost impossible."

President Coolidge said in his annual message to Congress (67 Congressional Record, 121), that:

> *"But it is evidently not enough to have care in making appropriations without any restraint upon expenditures. The Congress has provided that check by establishing the office of Comptroller General.*
>
> The purpose of maintaining the Budget Director and the Comptroller General is to secure economy and efficiency in Government expenditure. No better method has been devised for the accomplishment of that end. These offices can not be administered in all the various details without making some errors both of fact and of judgment. But the important consideration remains that *these are the instrumentalities of the Congress and* that *no other plan has ever been adopted which was so*

successful in promoting economy and efficiency. The Congress has absolute authority over the appropriations and is free to exercise its judgment, as the evidence may warrant, in increasing or decreasing budget recommendations. But *it ought to resist every effort to weaken or break down this most beneficial system of supervising appropriations and expenditures. Without it all the claim of economy would be a mere pretense.*" (Italics ours.)

That this system of accountability for public money has worked well is attested by the fact that in 137 years' history of our Government there have been no charges of scandal or fraud in the expenditure of public money for which Congress had made detailed provision and required an accounting therefor to the accounting officers of the United States. Charges of fraud and corruption, to which this Court has recently listened in the *Pan Petroleum Oil case,* have been more or less frequent in the administrative handling of the land, mineral, and other physical resources of the United States, and it is to be noted that there is no immediate check or control over administrative officers in the disposition of the physical property in their charge. Surely we are justified in concluding that the system of accountability for public money, which has been in existence since the foundation of the United States for all the branches of the Executive Departments of the Government except the Post Office Department to 1836, and which was applied to said Department at the urgent request of Postmaster General Kendall, and which was deliberately adopted for the Philippine Islands in the Organic Act, has had something to do with the matter. In the language of President Coolidge, *it is the best plan that has been*

devised to secure economy and efficiency in the expenditure of public money. In any event, both the statutes and the history of our Government are committed to appropriation control by Congress through the accounting officers over the spending agencies of both the United States and the Philippine Governments.

It may be said that this is also true with respect to the Porto Rican and Hawaiian Governments.

The second case cited by counsel for the company (p. 12), is that of *United States v. Johnston* (124 U. S. 236), which arose out of the settlement of the accounts of a special agent of the Treasury who had been engaged to collect confiscated cotton of the late Confederate States. The settlement there in question was one against the special agent—not against the United States—to recover expenses which had been approved by the Secretary of the Treasury. *Mr. Justice Harlan was careful to point out that the payments made to the special agent on order of the Secretary of the Treasury were made from the proceeds of the cotton and not from general appropriations in the United States Treasury.* In other words, *the question there was not the availability of a general appropriation, as here, to pay a specific claim but was a question whether the special agent was indebted to the United States.* Compare *Soule v. United States* (100 U. S. 8). Also, compare *Rex v. Roberts.* Obviously, the *Johnston case* is not a precedent in this case but it is instructive to note that Congress has since provided in the act of June 8, 1896 (29 Stat. 268):

> "That from the proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, before being deposited in the Treasury, either as miscellaneous receipts on

> account of 'proceeds of Government property' or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales, *as approved by the accounting officers of the Treasury* * * *." (Italics ours.)

It would thus appear that the same considerations which led to the enactment of the act of July 15, 1870, negativing the effect of the *Jones case*, also led to the enactment of the act of June 8, 1896, reserving to the Congress, through the accounting officers, the power theretofore existing in the administrative departments to approve expenses of sales of Government material; that is, in the language of Secretary Woodbury, to take away from those "empowered by law to decide on the necessity of certain services and purchases" the power to "adjust the accounts rendered for" such services and purchases. (p 25, main brief).

We concede that where either Congress or the Philippine Legislature has appropriated a specific sum to pay a particular salary or claim, as in the *MacVeagh*, and *Ormes cases*, mandamus may properly issue in aid of legislative control over public money in event the Comptroller or Auditor fails or refuses to countersign a warrant for payment of same, but *we contend that mandamus cannot properly issue where either Congress or the Philippine Legislature has appropriated a general or lump sum to pay a general class of claims and has reposed in the Comptroller or Auditor the responsibility of determining whether any particular claim is payable from said general appropriation.* Mandamus issued under such circumstances would defeat legislative control over public money, a control older than our present

form of Government (pp. 22-24, and 30, main brief).

Moreover, the determination of the availability of a general appropriation to pay a claim is from the very nature of the case a discretionary, and not a ministerial duty even when exercised by the spending agencies, as was properly recognized in the *Brashear, Decatur,* and *Guthrie cases* (pp. 16, 31, main brief), before same reached the accounting officers for final determination except for appeal to Congress. It would seem to be clear that the cases of *Commissioner v. Whitely* (4 Wall. 522), and *Lane v. Hogland* (244 U. S. 174), cited by counsel for the Company (p. 21), are not appropos.

We think that the case of *Smith v. Jackson* (246 U. S. 388) cited by counsel for the Company (p. 21), is sufficiently distinguished in our main brief (pp. 69-73). Compare *United States v. Lynch, supra,* and *Carroll Electric Company v. McCarl* (8 Fed. 2d 910), and *Margulies Company v. McCarl* (10 Fed. 2d 1012). Certiorari was denied October 11, 1926, to review the *Margulies case.* We would request this Court, if it can consistently do so, to explain and show the application of the *Smith v. Jackson case.* The present uncertainty of the lower courts with respect thereto is not conducive to good administration.[2] The

[2] District courts in *Dillon v. Groos* (299 Fed. 851), *Howe v. Elliott* (300 Fed. 243), *Mare v. Alexander* (2 Fed. 2d, 895), and the First Circuit Court of appeals in *Wylly v. McCarl* (5 Fed. 2d, 964) applying it to authorize issuance of a writ of mandamus in an original proceeding and the Ninth Circuit Court of Appeals holding that it did not do so in *Barber v. Hetfield* (4 Fed. 2d, 245). Also, a District Court holding in *Emerson v. Baker* (3 Fed. 2d, 830), that it did not authorize a mandatory and prohibitory injunction in the matter of the pay and allowances of an Army officer payable as in *Brashear v. Mason* (6 Howard, 92), from general appropriation and the Supreme Court of the District of Columbia in *Pence v. McCarl* (54 Wash. Law Rep. 178) and the Court of Appeals of said District in *McCarl v. Cox* (8 Fed. 2d, 669), holding that it did so authorize. It is to be noted that section 24 of the act of March 3, 1911 (36 Stat. 1093) reserves to the Court of Claims all jurisdiction of suits of Army and Navy officers for pay and allowances.

Cox, Mare, and *Pence cases,* cited by counsel for plaintiff (p. 21), concern the pay of Army and Navy Officers. The lower courts purported to follow in said cases, as did the court below in this case, the *Smith v. Jackson case.* This is not a salary question. Even if it were, we submit that said decisions of the lower courts cannot be reconciled with either the decisions of this court in the *Brashear, Decatur,* and *Guthrie cases,* or, if we are correct in our explanation of the *Smith v. Jackson case,* with said case.

II.

THE CLAIMS APPROVED BY THE COLLECTOR, EITHER FOR COLLECTION OF CUSTOMS OR FOR REFUND THEREOF, DO NOT CONSTITUTE EXCEPTIONS TO THE GENERAL RULE THAT THE AUDITOR, SUBJECT TO ADMINISTRATIVE APPEALS OR APPEAL TO CONGRESS OR TO THE PHILIPPINE LEGISLATURE HAS EXCLUSIVE AND CONCLUSIVE JURISDICTION TO SETTLE ALL CLAIMS FOR OR AGAINST THE PHILIPPINE GOVERNMENT CHARGEABLE TO GENERAL APPROPRIATIONS.

For the purpose of ready comparison of their terms, we quote, in juxtaposition, the pertinent provisions of the statutes, under which exclusive jurisdiction is claimed for the Collector and of the statutes under which we contend that the Collector's decisions for refund of customs duties are made subject to the judgment and discretion of the Auditor.

The Philippine Tariff Act of August 5, 1909 (36 Stat. 130), provided that duties should be collected on:

"200 * * * costs of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine Coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands. * * * Provided, That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

The following articles shall be free of duty:

"348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the Collector of Customs that adequate facilities for such repairs

The Organic Act of August 29, 1916 (39 Stat. 545), provided:

"Sec. 24. * * * The decisions of the Auditor [who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government * * * and audit, in accordance with laws and administrative regulations all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches] shall be final and conclusive upon the executive branches of the Government, except that an appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year in the manner hereinafter prescribed. The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United

are not afforded in the Philippine Islands."

This act was amended in 1919, by the Philippine Legislature, to provide:

"That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said Collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

States Treasury * * *."

Section 584 of the Code provided:

"The authority and powers of the Bureau of Audits [the office of the Auditor] extend to and comprehend all matters relating to accounting procedure, including * * * the examination and audit of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches."

Section 587 of the Code provided:

"No insular warrant shall be paid by the Treasurer, until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

The learned counsel for the Company have not attempted to advance any reasons why claims approved by the Collector for refund of customs duties should be conclusive on the Auditor when the Auditor's decisions are made by the specific terms of a statute, subsequent in date to that under which the Collector functions, final and conclusive on all executive officers and branches of the Philippine Government, subject to appeal to the Governor General and the Secretary of War or to the

Congress and, in some instances, to the Philippine Legislature. We submit that reasons therefor cannot be advanced, particularly, when, as shown by the committee reports, which are quoted as an appendix to the brief for the Company, it was the avowed intention of the framers of Section 24 of the Organic Act to require all accounts to pass through "the hands of the Auditor" for the purpose of insuring "a protection against the possibility of graft or the misappropriation of funds in the Islands."

It would indeed be strange to find that the accounts of a Philippine Collector of Customs had been exempted from audit and settlement by the Auditor when for more than an hundred years the accounts of Collectors of Customs in the United States have been subjected to two audits and settlements—one by Naval officers, now Comptrollers of Customs, and the other by the accounting officers of the Treasury, now the General Accounting Office (pp. 43-44, main brief.) The Organic Act contains no intendment that in granting the Philippine Islands a more autonomous form of Government, it was found desirable to depart from safeguards in the accounting for appropriated moneys which experiences of a century had demonstrated were necessary in the United States, and, as appears from *Rex v. Roberts*, were likewise necessary in England.

The following pertinent extract is quoted from Report No. 1369, 69th Congress, 1st Session, from the Committee on Insular Affairs:

> "The accounting system for the governement of the Philippine Islands is substantially the system that has been in operation in the United States since the said ordinance of September 26, 1778. The Constitution provides in Article I, section 9, that no money shall be drawn from the Treasury

save in consequence of an appropriation by law, and the organic act contains a similar provision with respect to the treasury of the Philippine Islands. At no period in the history of the United States could money be secured from the United States Treasury except after an appropriation by Congress and on warrants drawn by some one of the heads of the various executive departments—now the Secretary of the Treasury—and countersigned by the Comptrollers of the Treasury, now the Comptroller General of the United States. *Also, at no time in our history have public moneys been advanced to officers of the Government for expenditure in their discretion and without being required to account therefor except in a few instances in time of war.*

"In the early days there was some dispute between the executive departments and the Comptrollers of the United States Treasury as to whether their settlements were final and conclusive on the executive departments, but this dispute was settled in favor of the contentions of the comptrollers by the act of March 30, 1868 (15 Stat. 54), which provided that such settlements should 'be taken and considered as final and conclusive upon the executive branch of the Government.' There was a recommendation before Congress in 1869 for repeal of this provision, but the House Committee on Revision of the Laws reported unfavorably thereon. The committee said that:

"'* * * Power in the head of the War or any other department to set aside and change the findings of the accounting officers of the Government is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the depart-

ment under whose direction the money was paid or the claim accrued, then the whole system of checks to improper expenditures, which it was supposed had been established, falls to the ground. (26 Cong. Rec. 4342.)[3]

"No change has ever been made in this provision, and same was carried into the organic act as

[3] Notwithstanding the act of March 30, 1868 (15 Stat. 54), carried into the Revised Statutes as Section 191 and into the Budget and Accounting Act of June 10, 1921 (42 Stat. 24), as a part of Section 304, and Section 24 of its Organic Act of 1916, conferring on the Auditor "like authority as that by law conferred upon the several auditors of the United States and the Comptroller of the United States Treasury," except as expressly provided in said Section 24 (and the exception is an increase in authority), the Supreme Court for the Philippine Islands said in the recent case of *Magdaleno Riel v. Wright*, in answer to the contention of the Auditor that the courts of the United States did not control the auditors and Comptrollers in their construction of general appropriation Acts, that:

> "For a number of years, it has been and is now the policy of this Court to follow and respect the decisions of the Supreme Court of the United States in so far as these decisions construe or apply to the law of the Philippine Islands, and if it be a fact that the Insular Auditor has the same powers and duties as the U. S. Comptroller, we would follow and approve those decisions.
>
> The vice of the argument made by the Insular Auditor in person lies in his assumption that, under the law of the Philippine Islands, he has like powers and duties as the U. S. Comptroller under the laws of the United States.
>
> As was pointed out in the Ynchausti case, the law here expressly says that the decisions of the Insular Auditor are binding upon the "executive branch" of the government. The fact that the law specifically says that his decisions are binding upon the "executive branch" of the government, under all rules of statutory construction, clearly implies and carries with it that his decisions are binding upon the executive branch only, and that they are not binding upon any other branch of the government.
>
> Under the law of Congress, there is no such limitation upon the powers and duties of the U. S. Comptroller. The finality of his decisions is not confined or limited to the executive branch of the government, but they apply with equal force and effect upon all branches. If and when the law is amended to confer upon the Insular Auditor of the Philippine Islands like powers and duties as those of the U. S. Comptroller, the authorities cited by the Insular Auditor would then be in point, and will be followed and approved by this Court. Until such time as that is done or our decision is overruled by the United States Supreme Court, upon that question we will follow and approve the law as laid down by this Court in its former decisions." Compare decision of same court in *Lambs v. Phipps*, (22 Phil. Rep. 480).

to the effect of the settlements of the Auditor for the Philippine Islands, and it was said by the Court of Claims in Geddes v. United States (38 Ct. Cl. 428), at page 444, that:

" 'The accounting officers are the guardians of the appropriations. It is their business to see that no money is paid out of the Treasury unless the payment is authorized by an appropriation act. It is not their business to adjudicate abstract questions of legal right beyond the legal right of a person to be paid out of a specific appropriation. An appropriation constitutes the means for discharging the legal debts of the Government.

'The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them. * * *'

"There was no right to sue the United States prior to 1855, and even after such right to sue had been given, Congress did not authorize the payment of judgments from general appropriations in the Treasury but required such judgments to be reported to it for specific appropriations with which to pay same. (See act September 30, 1890, 26 Stat. 537.) In other words, Congress remained in control over appropriated public money through the Comptrollers of the Treasury, and the judgments of the courts had nothing to do with such appropriated moneys.

"Prior to 1855, when the United States consented to be sued, there were several attempts to secure public money from the United States Treasury by means of extraordinary judicial process against public officers, but such attempts were uniformly abortive.

"Even after the United States had consented to be sued, the Supreme Court of the United States denied a writ of mandamus against the Comptrollers of the Treasury (United States v. Lynch, 137 U. S. 280); and while such writs had been allowed

in a few instances against other officers of the Government to require payment of some specific appropriation made by Congress (Houston v. Ormes, 252 U. S. 469, and Smith v. Jackson, 241 Fed. 747, 246 U. S. 388), *it was believed when the organic act was enacted that the incorporation in said act of the language contained in laws relating to the auditors and Comptrollers of the Treasury with respect to the finality of their settlements would give the auditor for the Philippine Islands the same immunity from control by extraordinary judicial process.*" (Italics ours.)

We are not required to invoke the principle of interpretation applied in *Rex v. Roberts* for the reason that the Organic Act of 1916, subjecting all accounts for revenues from whatever source, and all expenditures of money to the settlements of the Auditor, is a later statute than the Philippine Tariff Act of 1909, under which it is claimed the Auditor has a mere ministerial duty to perform with respect to the accounts and claims of the Collector of Customs. It is true that the Philippine Legislature, in 1919, amended Section 200 of the Philippine Tariff Act of 1909, to add the phrase "so that the work can not be done there reasonably, economically, and within a reasonable time, in the judgment of the Collector." We submit, however, that the Philippine Legislature, does not have the power, under Section 10 of the Organic Act of 1916 (39 Stat. 545, 548), to enact legislation contrary to the terms of the Organic Act or to impose certain duties on officials other than the officials specified in the Organic Act or any other act of Congress respecting the Government of the Philippine Islands. The authority conferred by that section related to changes in duty rates, only. The Philippine Legislature, with the concurrence of the

President, has not the power to change the form of Government established by the Congress for said Islands or to transfer to some other official jurisdiction and duty to settle claims against the Government which the laws of Congress have reposed in the Auditor (pp. 46-48, main brief).

Counsel for the Company criticize (p. 17), our argument (pp. 42-43) to the effect that when no appeal is taken to the Courts of First Instance from a decision of the Collector, as provided in Sections 1383 and 1384 of the Code, the claim remains in the executive branches of the Philippine Government and any collection or allowance by the Collector is subject to the audit and settlement of the Auditor, his countersignature to a warrant being required before any claim for refund can be paid. The situation is far from being anomalous. A similar situation exists in the United States as to claims against the District of Columbia. There is an auditor for the District of Columbia, but all accounts and claims settled and allowed by him are required to be subsequently settled by the accounting officers of the Treasury, now the General Accounting Office. Section 2 of the act of March 3, 1883 (22 Stat. 471). In a decision of November 27, 1908, the Comptroller of the Treasury said:

> "Under the system of laws provided for paying the expenses of the District of Columbia, Congress has only provided for advancing to the District of Columbia out of the Treasury of the United States the moneys necessary to enable said District to pay the debts properly incurred by it and required the said District to account for the disbursement of such advances on vouchers properly certified by the Commissioners. The claim of a creditor (of the District of Columbia not allowed by the

> Commissioners) is not one that the Auditor for the State and other Departments has any authority to settle and adjust" under the act of March 3, 1883.

In other words, if the Commissioners of the District of Columbia refuse to allow a claim, the recourse must be either to the Congress or to the courts and thence to the Congress for an appropriation. The accounting officers of the United States are not concerned therewith. If the Commissioners do allow the claim, such allowance is subject to audit and settlement by the accounting officers of the United States, and the Commissioners frequently avail themselves of the provisions of Section 8 of the act of July 31, 1894, to secure from the Comptroller advance decisions to guide them in their approval or disapproval of claims. See, for instance, 4 Comp. Gen. 511, *id.* 552. So here, if the Collector refuses to approve a claim for refund of customs duties, the claimant must resort to the Court of First Instance or to the Philippine Legislature. If he does approve the claim, it is subject to audit and settlement of the Auditor and his decision is made final and conclusive on the Collector. Since the exercise by the Auditor of this semi-judicial authority and jurisdiction in the settlement of the claim for refund of custom duties[4] and in determining the availability

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[4] Hotchkiss, *Judicial Work of the Comptroller of the Treasury* (1911), after comparison of the work of the accounting officers of the United States with the work of similar officers in France and Germany (and he might have made a similar comparison with the work of the Comptroller and Auditor General of England, see Willoughby, Willoughby and Lindsay, *Financial Administration of Great Britain* (1917), pp. 144-182, 209-234), said (pp. 141-142) that:

> "Among the many branches of government activity by which the law is being developed and construed, there is nowhere a more intimate connection with the property rights of individuals than in the judicial work of the Comptroller. In addition to a jurisdiction on a

of appropriations to pay same involve judgment and discretion of the highest order and since there is no statutory provision for review by the courts of his action, it follows, under a long line of decisions summarized in *Work v. Rives* (207 U. S. 175), that the court below erred in issuing a writ of mandamus against the Auditor to require him to countersign a warrant for payment of said claim.

Conclusion

We submit for the reasons advanced in our main brief and for the reasons herein advanced that the judgment of the court below is erroneous and should be reversed with directions to dismiss the petition.

Respectfully submitted,

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

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par with that of the Continental courts of accounts, which the Comptroller possesses as chief of the accounting department of the government, he exercises in part at least, the jurisdiction over private claims which is lodged in France with the regular administrative courts. Though his decisions are final only when the claimant chooses not to undertake the burden of a suit [against the United States] at law, ~~the power to sue is a right to undertake the burden of a suit at law~~ the power to sue is a right which in the vast majority of cases it is impracticable to exercise. In the actual operation of our system the Comptroller is usually the final judge."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted]316

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

v.

YNCHAUSTI & COMPANY, *Respondent.*

BRIEF OF RESPONDENT ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

ALEXANDER BRITTON,
LAWRENCE H. CAKE,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 1051.

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

v.

YNCHAUSTI & COMPANY, *Respondent.*

BRIEF OF RESPONDENT ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

January 19, 1925, Ynchausti & Company filed in the Supreme Court of the Philippine Islands a petition for a writ of mandamus to be directed to Ben. F. Wright, Insular Auditor, to require him to countersign a warrant for 159,960 pesos drawn by the Insular Collector of Customs in favor of the petitioner. (R. 2-5.) The Insular Auditor filed an answer, to which the petitioner demurred on the ground that the facts stated therein

were not sufficient to constitute a defense. The Supreme Court of the Philippine Islands, after hearing argument and re-argument, ordered that the writ issue as prayed. A motion for reconsideration was denied, and final judgment was entered, October 6, 1925. Following is a statement of the facts in the case.

In 1924, Ynchausti & Co., agent and operator of the steamship *Venus*, a vessel engaged in the coastwise trade in the Philippine Islands, caused certain heavy repairs and construction work to be done at Hongkong.

The Philippine Tariff Act of 1909 provided that a duty should be imposed on the cost of such repairs made in foreign countries unless it was made to appear "upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector."

When the vessel arrived in Philippine waters the Insular Collector of Customs assessed a customs duty of 159,960 pesos on account of the repair work done at Hongkong, which was paid to him by Ynchausti & Co. under protest, the protest being on the ground that the repairs were not dutiable under the law.

Thereafter, the Insular Collector of Customs, after a hearing, rendered a decision sustaining the protest and ordered a refund of the money paid. All the requirements of law,—the Tariff Act of 1909, and the Administrative Code, 1917,—were fully complied with and copies of the Collector's decision were sent to the Secretary of Finance and the Insular Auditor. No appeal from the Collector's decision was taken to the

Court of First Instance, as authorized by law, although the Insular Auditor did request and urge that such an appeal be taken.

After the time for an appeal had expired, a warrant was drawn by the Collector in favor of Ynchausti & Co. for 159,960 pesos, the amount of the duty found to have been wrongly assessed and collected. Upon presentation of the warrant to the Insular Auditor for his countersignature, as provided in section 621 of the Administrative Code, he refused to countersign it. The petition alleged and the answer admitted that at the time the petition was filed he still persisted in his refusal to countersign the warrant.

THE POINTS OF LAW.

On the foregoing statement of the case the questions which immediately suggest themselves are:

(1) Was the Insular Collector of Customs vested with jurisdiction and authority to render a decision on the protest and to determine whether the claimant was entitled to a refund of the money paid?

(2) Was the Insular Auditor vested by law with any power of review or control over the decision of the Insular Collector of Customs in such a case?

(3) Did the Insular Auditor's action in countersigning the warrant, as provided in section 621 of the Administrative Code, involve the exercise of a judicial discretion?

(4) Was the application for a writ of mandamus the only remedy?

(1) WAS THE INSULAR COLLECTOR OF CUSTOMS VESTED WITH JURISDICTION AND AUTHORITY TO RENDER A DECISION ON THE PROTEST AND TO DETERMINE WHETHER THE CLAIMANT WAS ENTITLED TO A REFUND OF THE MONEY PAID?

The answer is that the Philippine Tariff Act of 1909, as originally enacted and as since amended, has vested the Insular Collector of Customs with absolute and exclusive jurisdiction and authority to determine in a given case the dutiability of repairs made abroad on vessels of Philippine registry.

The Philippine Tariff Act of 1909,—Act August 5, 1909, c. 8, 36 Stat. 130,—contains the following:

> "Sec. 8. That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States or any of its possessions except as otherwise provided in this Act, shall be as follows:
>
> * * * * * * * * *
>
> '200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, *and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands,* fifty per centum ad valorem.
>
> '*Provided,* That *upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs,* the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and
>
> '*Provided further,* That if the owner or master of such vessel shall furnish evidence satisfactory

to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Phillippine Islands, such duty shall not be imposed; and

'*Provided further*, That furnishings, stores, and supplies, not otherwise provided for, purchased abroad and imported in such vessels shall be dutiable under the corresponding paragraphs of this Act.

The expression 'imported into the Philippine Islands,' shall be held to mean 'brought into the jurisdictional waters of the Philippine Islands in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail, or other motive power.' * * *

'SEC. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph:

* * * * * * * * *

'348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, *upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands.*' "

In *Fernandez Hermanos v. Insular Collector of Customs*, 30 Phil. Reps. 50, the Supreme Court of the Philippine Islands held that if the repairs *as a whole* could not be made in the Philippine Islands, they might all be made abroad and would come in free of duty, on the ground that the act made no distinction between re-

pairs which could be made in the Islands and repairs which would have to be made abroad.

In *Gutierrez Hermanos v. Insular Collector of Customs*, 39 Phil. Rep. 876, which involved the same provision of the Tariff Act, in a case in which it was shown that there were adequate facilities in the Philippine Islands for making and installing all the repairs and parts except the manufacture of a tail shaft which would have to be brought in from abroad, the court held that such repairs, if done in a foreign port, would be subject to duty.

In view of the decision in the latter case which, it was feared by some, might lead to restrictive administrative interpretation, thereafter, November 24, 1919, the Philippine Legislature, acting under the authority conferred by section 10 of the Organic Act,* enacted Act No. 2872, which was approved by the President of the United States on November 24, 1919, and published by the Governor General by proclamation dated December 11, 1919. Vol. XVII Official Gazette, 2055. The act amended section 8, paragraph 200 of the Tariff Act of 1909, *supra*, to read as follows:

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*Act August 29, 1916, c. 416, 39 Stat. 545; sometimes referred to as the Jones Act; section 10 of which provides:

"Sec. 10. That while this Act provides that the Philippine government shall have the authority to enact a tariff law the trade relations between the islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States: *Provided*, That tariff acts or acts amendatory to the tariff of the Philippine Islands shall not become law until they shall receive the approval of the President of the United States, nor shall any act of the Philippine Legislature affecting immigration or the currency or coinage laws of the Philippines become a law until it has been approved by the President of the United States: *Provided further*, That the President shall approve or disapprove any act mentioned in the foregoing proviso within six months from and after its enactment and submission for his approval, and if not disapproved within such time it shall become a law the same as if it had been specifically approved."

"200. Boats, launches, lighters, and other craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorum until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorum on and after January first, nineteen hundred and twenty-five.

"Provided, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector*, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act," etc.

The effect of the amendment was to add to the proviso the words "so that the work can not be done there reasonably economically and within a reasonable time, *in the judgment of said collector.*"

It is obvious that by the Tariff Act of 1909, as amended, the Insular Collector of Customs is vested with *exclusive* jurisdiction to determine the question of fact whether in a given case there are adequate facilities in the Philippine Islands, so that the work can be done reasonably economically and within a reasonable time.

His decision and finding of fact, in this case, that there were no adequate facilities in the Philippine Islands for the repairs in question (R. 19-20), is final and conclusive and binding on all administrative officers of the Philippine Government, no appeal having

been taken from his decision to the Court of First Instance, as authorized by law.

(2) Was the Insular Auditor Vested by law With any Power of Review or Control Over the Decision of the Insular Collector of Customs in Such a Case?

The Insular Auditor derives his powers from the Organic Act,—Act August 29, 1916, c. 416, 39 Stat. 445,—the purpose of which was "to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands."

If the Insular Auditor has any power to review the decision of the Insular Collector of Customs, or any discretionary or quasi-judicial duty to perform in such a case as this, it must be found in section 24 of that Act, which provides:

> "Sec. 24. That there shall be appointed by the President an auditor, who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches.
>
> He shall keep the general accounts of the government and preserve the vouchers pertaining thereto.

It shall be the duty of the auditor to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive, or extravagant.

* * * * * * * * *

"The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive."

* * * * * * * * * *

"The decisions of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed. The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office."

The Insular Auditor contends that by that section he is vested with exclusive jurisdiction and authority to determine whether "any claim" for the payment of money (including a claim as in this case for the repayment of money paid to the Insular Collector of Customs under protest and later found and determined by that Officer, acting under the Tariff Act of 1909 as amended, to have been wrongly collected) shall be recognized and paid, and that his duty is discretionary and quasi-judicial notwithstanding the express language of section 8, paragraph 200, and section 11, paragraph 348 of the Tariff Act of 1909, as amended.

That his contention is unsound is at once apparent from a reading of the Tariff Act of 1909, as amended by Act No. 2872 of the Philippine Legislature, which is of equal force and validity as the Organic Act and must be read with it.

Certainly the Tariff Act of 1909 is an act of Congress,* as is the Organic Act, and certainly the amendatory act No. 2872 enacted by the Philippine Legislature under the authority conferred by *section 10 of the Organic Act* and approved by the President of the United States, is a valid and effective amendment.

The Tariff Act of 1909, as originally enacted, provided that repairs made in foreign countries should be free of duty "upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands." The amendment by act No. 2872 added the words "so that the work cannot be done there reasonably economically and within a reasonable time, *in the judgment of said Collector.*" As we have already pointed out, it is impossible to read those provisions with section 24 of the Organic Act and find any ground whatever for the Insular Auditor's contention that *he* is vested by law with a discretionary or quasi-judicial jurisdiction in such matters.

It may be observed also that the Auditor did not put his defense on the ground that funds were not available for the payment of the warrant. In fact, he could not do so, as the Supreme Court of the Philippine Islands points out in its decision (R. 84), because there is at all times a permanent and continuous appropriation for the payment of such refunds, provided by Act No. 357 as amended by Act No. 1515.

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*It is "a statute of the United States." *Gsell v. Insular Collector of Customs*, 239 U. S. 93.

In the brief in support of the petition for certiorari counsel undertake to argue the general proposition that the determination of the availability of a general appropriation for the payment of claims is always a quasi-judicial or discretionary matter within the exclusive jurisdiction of the accounting officers. We submit, however, that that question is not at all involved in this case, first, because the Auditor has not defended the case or put his refusal to countersign the warrant on that ground, and second, because in any event the law here has expressly conferred on the Collector of Customs the exclusive power to decide the question of *fact* on which the right to the refund depends. The Auditor's broad contention has been that he has some power of review of the Collector's decision on that question of *fact*. That contention of the Auditor is the only question which is presented by this petition for certiorari and all argument and discussion of other issues is beside the point.

(3) Does the Insular Auditor's Action in Countersigning the Warrant, as Provided in Section 621 of the Administrative Code, Involve the Exercise of a Judicial Discretion?

It has been held repeatedly that where such discretion is vested in another officer as is here vested in the Insular Collector of Customs the decisions of that officer with respect to such matters are conclusive and binding on the accounting officers of the Government.

United States v. Jones, 18 How. 92.
United States v. Johnston, 124 U. S. 236.

In *Savings Bank of Pittsburgh v. United States*, 16 Ct. Cl. 335, the Commissioner of Internal Revenue had

made a certificate of allowance of claim and the Secretary of the Treasury had approved it, but the Comptroller refused to pass the allowance and to countersign the warrant. Quoting from the opinion of the court:

> "At the trial it was argued that the decision of the Comptroller refusing to pass the allowance and to countersign a warrant for its payment had some bearing upon the claimant's right to recover in this court. But such is not the case. The Comptroller is merely an accounting officer, the agent of one only of the parties to claims against the government, the officer clothed with authority to determine whether the Treasurer shall be authorized to pay a demand in the form and under the circumstances in which it is presented to him, and not an arbitrator to finally settle and determine the legal rights of both parties."

In a similar case, *Barnett v. United States*, 16 Ct. Cl. 515, the court said:

> "Four cases of this description have been before us, in each of which we were called upon to declare our judgment upon the effect of section 3220 of the Revised Statutes, which, so far as it defines the powers of the Commissioner of Internal Revenue, is as follows:
>
> > 'Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.'

> In each of those four cases the Commissioner made an allowance of a refund of taxes illegally assessed; in each of them the Comptroller of the Treasury refused to pass the claim; and in each of them this court gave the claimant judgment for the amount which the Commissioner had allowed. (*Kaufman's Case*, 11 C. Cls. R., 659; *Woolner's Case*, 13 *ib.*, 355; *Bank of Greencastle's Case*, 15 *ib.*, 225; and *Real Estate Savings Bank of Pittsburgh's Case*, *ante*, 335.)
>
> Only one of those cases—that of Kaufman—has been passed upon by the Supreme Court of the United States, and in that our judgment was affirmed."

In the present case there was no room for the exercise by the Auditor of any judicial discretion. As pointed out in the opinion of the Supreme Court of the Philippine Islands (R. 77), the Insular Auditor's duty was "confined and limited to an investigation of the primary and fundamental facts as to whether a protest was duly filed and a hearing was duly had upon the protest, and that the Collector of Customs had ordered the refund of the money in question and whether there had been a compliance with all of the legal formalities concerning the protest."

That duty involved nothing more than a ministerial discretion, and the remedy by mandamus to compel the performance of that duty is clear.

> *Lane v. Hoglund*, 244 U. S. 174,
> L. R. A. 1916-D, p. 324, note,
> 18 R. C. L. 223-225, secs. 148-149.

In *Hoey v. Baldwin*, 1 Phil. Rep. 551, the petitioner alleged that proper certificates showing that he was entitled to receive his salary had been filed with the de-

fendant. It was held: "The only duty which the defendant had to perform in this case was to pay the money to the plaintiff. This was a duty purely ministerial, which the law specially enjoins as a duty resulting from his office."

In *Lamb v. Phipps*, 22 Phil. Rep. 456, the court was called upon to decide whether the Insular Auditor, in examining and settling an account and balancing items of debit and credit, was exercising a judicial discretion not controllable by mandamus. It was held that he was, but the court said:

> "Auditors and comptrollers, as accounting officers, are generally regarded as quasi-judicial officers. They perform *mere ministerial duties* only in cases *where the sum due is conclusively fixed by law or pursuant to law.* Except in such cases, the action of the accounting officers upon claims * * * is not ministerial merely but judicial and discretionary."

In *Zobel v. City of Manila*, XXXIII O. G. 411, recently decided, the Supreme Court of the Philippine Islands said:

> "Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first instalment of the purchase price; and it is insisted for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. The general provisions of law defining the jurisdiction and powers of the Auditor and which, if

literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Government must be considered to be qualified as regards the contract rights of persons dealing with the city by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor should possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

It is idle to say that the acts of the accounting officers of the United States, or the Insular Auditor, can not be controlled by mandamus or injunction. Any officer acting beyond his authority under the law may be enjoined upon the application of anyone who shows that he is being injured by such unauthorized acts. Likewise any officer who refuses to perform a ministerial duty imposed by law may be required to do so by mandamus.

Accounting officers are not exempt from the rule.

Smith v. Jackson, 246 U. S. 388.
McCarl v. Cox, 8 Fed. (2d) 669 (certiorari denied March 15, 1926).
Dillon v. Groos, 299 Fed. 851.
Mare v. Alexander, 2 Fed. (2d) 895, 5 Fed. (2d) 964.
Pence v. McCarl, 54 Wash. Law Rep. 178.

(4) Was the Application for a Writ of Mandamus the Only Remedy?

In this case the complainant had no other remedy. Certainly it had no remedy by suit against the Philippine Government, because there is no provision of law authorizing such a suit.

Neither did it have any remedy by appeal to the Governor General, as suggested by counsel for the Insular Auditor. The provision in section 25 of the Organic Act, that any person aggrieved by the action or decision of the Insular Auditor in the settlement of an account or claim before the Auditor under section 24, may take an appeal to the Governor General and to the Secretary of War, obviously refers to accounts and claims before the Insular Auditor which he is required to "examine, audit, and settle" and which involve the exercise of a judicial discretion. His duty in this case, however, is limited to countersigning the warrant drawn by the Insular Collector of Customs (after satisfying himself that the Collector has rendered a decision in a case properly before him under the Tariff Act of 1909, and that the amount of the warrant is in accordance with the terms of the decision). The duty in this case is plainly ministerial and involves the exercise of no judicial discretion. The Auditor's refusal to act, therefore, can not be corrected by an appeal to the Governor General.

In *Compania General de Tabacos v. French*, 39 Phil. Reps. 34, the Supreme Court of the Philippine Islands said:

> "The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts.
>
> "In considering the case before us, it is important to bear in mind that the Government is admittedly indebted to the petitioner in the definite and certain sum of P322.93. No action, either administrative or judicial, is therefore necessary to fix this liability upon the Government. In so far as legal liability can result from governmental activities, liability exists and upon the demurrer

is admitted. Furthermore, said liability is such that it should be absolved by a warrant drawn by the Purchasing Agent and countersigned by the Insular Auditor. The law makes provision for the payment of the money in this way, and it cannot otherwise be gotten out of the Insular Treasury.

"The legal remedy here indicated as proper is the writ of mandamus to compel the Purchasing Agent and the Insular Auditor to issue, countersign, and deliver the proper warrant to the petitioner. (Hoey vs. Baldwin, 1 Phil. Rep. 551.)

"The liability of these officers to the coercive process of mandamus arises from the fact that a valid claim exists for the payment of which provision has been made, that these officers are the appointed agents for making the payment, and that under these circumstances the execution and delivery to the creditor of the warrant are merely ministerial functions involving no discretionary action whatever."

CONCLUSION.

This petition for certiorari presents no question of general public interest or of special novelty. The Congress of the United States has vested the Insular Collector of Customs with power and jurisdiction to determine in any case whether there are adequate facilities in the Philippine Islands for making repairs to vessels. Acting pursuant to that authority the Collector, in this case, found as a fact and decided that the repairs could not be made in the Philippine Islands and that as a result the respondent was entitled to an immediate refund of the duties paid under protest. The method prescribed by law for reviewing the decision of the Collector, by appeal to the Court of First Instance, was not followed, but the Auditor (petitioner

here), assuming the power of review possessed only by the court, undertook to overrule the Collector by refusing to countersign the warrant.

All questions presented and argued in this petition and supporting brief are technical in nature and made with the intention and hope of sustaining, if possible, this power of review claimed by the Insular Auditor. As such a result would be so clearly contrary to the plain provisions of the law and so subversive of the orderly course of business, it should not be permitted.

Respectfully submitted,

ALEXANDER BRITTON,
LAWRENCE H. CAKE,
Counsel for Respondent.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 316.

BEN F. WRIGHT, Auditor for the Philippine Islands,
Petitioner,

vs.

YNCHAUSTI & COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR RESPONDENT.

F. W. CLEMENTS,
LAWRENCE H. CAKE,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The issue in this case is a narrow one. It is the question of law whether the Insular Auditor has any power or authority, derived from the act of August 29, 1916, c. 416, 38 Stat. 545, to review the action of the Collector of Customs, under the Tariff Act of August 5, 1909,

c. 8, 36 Stat. 130, in deciding the right of the respondent to a refund of customs duties paid under protest and in drawing a warrant on unappropriated money in the treasury to pay such refund.

The proceedings were begun January 19, 1925, when Ynchausti & Company filed in the Supreme Court of the Philippine Islands a petition for a writ of mandamus to be directed to Ben F. Wright, Insular Auditor, to require him to countersign a warrant for 159,960 pesos drawn by the Insular Collector of Customs in favor of the petitioner (respondent here). (R. 2-5) The Insular Auditor filed an answer to which the petitioner (respondent here) demurred on the ground that the facts stated therein were not sufficient to constitute a defense. (R. 12-18) The Supreme Court of the Philippine Islands, after hearing argument and reargument, ordered that the writ issue as prayed. (R. 61-85) A motion for reconsideration was denied and final judgment was entered October 6, 1925. (R. 131, 132-133)

This Court granted a writ of certiorari, April 26, 1926, on the petition of the Auditor.

The following is a short statement of the material facts:

In 1924, Ynchausti & Co., agent and operator of the steamship Venus, a vessel engaged in the coastwise trade in the Philippine Islands, caused certain heavy repairs and construction work to be done at Hongkong.

The Philippine Tariff Act of 1909, hereinafter referred to, provided that a duty should be imposed on the cost of such repairs made in foreign countries unless it was made to appear "upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs,

so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector."

When the vessel arrived in Philippine waters the Insular Collector of Customs assessed a customs duty of 159,960 pesos on account of the repair work done at Hongkong, which was paid to him by Ynchausti & Co. under protest, the protest being on the ground that the repairs were free from duty under the law.

Thereafter, the Insular Collector of Customs, after a hearing, rendered a decision sustaining the protest and ordered a refund of the money paid. All the requirements of law—the Tariff Act of 1909, and the Administrative Code, 1917—were fully complied with and copies of the Collector's decision were sent to the Secretary of Finance and the Insular Auditor. No appeal from the Collector's decision was taken to the Court of First Instance, as authorized by law, although the Insular Auditor did request and urge that such an appeal be taken.

After the time for an appeal had expired, a warrant was drawn by the Collector in favor of Ynchausti & Co. for 159,960 pesos, the amount of the duty found to have been wrongly assessed and collected. Upon presentation of the warrant to the Insular Auditor for his counter-signature, as provided in section 621 of the Administrative Code, he refused to countersign it. At the time the petition for a writ of mandamus was filed he still persisted in his refusal to countersign the warrant.

POINTS OF LAW.

I.

THE COLLECTOR OF CUSTOMS IS INVESTED WITH (A) EXCLUSIVE JURISDICTION AND AUTHORITY, SUBJECT ONLY TO AN APPEAL TO THE COURT OF FIRST INSTANCE AS PROVIDED BY LAW, TO DETERMINE THE DUTIABILITY OF REPAIRS MADE ABROAD ON VESSELS OF PHILIPPINE REGISTRY; (B) AUTHORITY TO DETERMINE THE RIGHT OF A PROTESTANT TO A REFUND OF SUCH DUTIES PAID UNDER PROTEST; AND (C) AUTHORITY TO DRAW A WARRANT ON UNAPPROPRIATED MONEY IN THE TREASURY IN PAYMENT OF ANY SUCH REFUND FINALLY DETERMINED TO BE DUE.

The Philippine Tariff Act of 1909—Act August 5, 1909, c. 8, 36 Stat. 130—as originally enacted contained the following:

> "Sec. 8. That the rates of duty to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States or any of its possessions except as otherwise provided in this Act, shall be as follows:
>
> * * * * * * *
>
> '200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, *and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands,* fifty per centum ad valorem.
>
> '*Provided*, That *upon proof satisfactory to the collector of customs that adequate facilities are*

not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and

'*Provided further*, That if the owner or master of such vessel shall furnish evidence satisfactory to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Philippine Islands, such duty shall not be imposed; and

'*Provided further*, That furnishings, stores and supplies, not otherwise provided for, purchased abroad and imported in such vessels shall be dutiable under the corresponding paragraphs of this Act.

The expression 'imported into the Philippine Islands,' shall be held to mean 'brought into the jurisdictional waters of the Philippine Islands, in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail or other motive power.' * * *

"Sec. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph:

* * * * * * *

'348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, *upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands.*' "

In 1919 the Philippine Legislature, acting under the authority conferred by section 10 of the Organic Act (Act August 29, 1916, ch. 416, 39 Stat., 545), amended paragraph 200 to read as follows:

> "200. Boats, launches, lighters, and other craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorum on and after January first, nineteen hundred and twenty-five.
>
> "Provided, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector,* such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act." etc.[1]

The Administrative Code, 1917—Act No. 2711, Philippine Legislature, approved March 10, 1917—contains the following provisions:

---

[1] The effect of the amendment was to add to the proviso the words "so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector." The amendment was occasioned by a decision of the Supreme Court of the Philippine Islands in a case in which it was shown that there were adequate facilities in the Philippine Islands for making and installing all the needed repairs and parts except the manufacture of a tail shaft which would have to be brought in from abroad, the court holding that such repairs if done in a foreign port would be subject to duty. *Gutierrez Hermanos v. Insular Collector of Customs*, 39 Phil. Rep. 876. This decision it was feared might lead to restrictive administrative interpretation and consequently the Legislature amended paragraph 200 as shown above.

"Chapter 39.—Bureau of Customs."

* * * * * * *

"Sec. 1301. *Claim for refund and mode of payment.*—All claims for refund of duties shall be made in writing, and forwarded to the collector of customs to whom such duties were paid; and upon receipt of claims for refund, collectors of customs will verify the same by the records of their office, and if found to be correct and in accordance with law, will certify the same to the Insular Collector with their recommendations in the case, together with all necessary papers and documents. Upon receipt by the Insular Collector of any claim for refund so forwarded, he shall draw a warrant in payment and settlement thereof, if found correct."

* * * * * * *

"Sec. 1369. *Authority of Insular Collector to make compromises.*—The Insular Collector of Customs may compromise any case or proceeding arising under the customs laws and may refund money erroneously or illegally received, or fines imposed without authority."

With respect to the drawing of warrants in payment of refunds, in addition to the provision in section 1301, *supra,* it is provided in

"Chapter 26—Bureau of Audits"

* * * * * * *

"Sec. 616. *Persons authorized to draw warrants for payment of Insular funds.*—Warrants upon the Insular Treasury shall be drawn by the chief of Bureau or Office having control of the appropriation or fund against which such war-

rants are chargeable or by such subordinate as shall be designated for such duty by the proper Department head.

"Warrants chargeable to Insular appropriations or funds not under the control of a Bureau or Office shall be drawn by such officer as shall be specified by law or, in the absence of such, designated by the Governor-General."

* * * * * * *

"Sec. 621. *Countersigning of warrants by Auditor.*—No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

There was and is a permanent and continuous appropriation available for the payment of customs refunds, provided by Act No. 357 as amended by Act No. 1515. This is admitted by the Auditor's answer (R. 14), as pointed out in the opinion of the court below (R. 84).

II.

THE AUDITOR HAS NO POWER TO REVIEW THE DECISION OF THE COLLECTOR OF CUSTOMS AS TO THE DUTIABILITY OF SUCH REPAIRS OR THE RIGHT OF A PROTESTANT TO A REFUND BASED THEREON.

The Insular Auditor derives his power from the Organic Act—Act August 29, 1916, c. 416, 39 Stat. 545—the purpose of which was "to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands."

If the Insular Auditor has any power to review the decision of the Insular Collector of Customs, or any

discretionary or quasi-judiciai duty to perform in such a case as this, it must be found in section 24 of that Act, which provides:

> "Sec. 24. That there shall be appointed by the President an auditor,who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever sources of the Philippine government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches.
>
> He shall keep the general accounts of the government and preserve the vouchers pertaining thereto.
>
> It shall be the duty of the auditor to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive, or extravagant.
>
> * * * * * * *
>
> "The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive."
>
> * * * * * * *
>
> "The decisions of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the

> department concerned within one year, in the manner hereinafter prescribed. The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office."

The Insular Auditor contends that by that section he is vested with exclusive jurisdiction and authority to determine whether "any claim" for the payment of money (including a claim as in this case for the refund of money paid to the Insular Collector of Customs under protest and later found and determined by that officer, acting under the Tariff Act of 1909 as amended, to have been wrongly collected) shall be recognized and paid, and that his duty is discretionary and quasi-judicial notwithstanding the express language of section 8, paragraph 200, and section 11, paragraph 348 of the Tariff Act of 1909 as amended.

He also contends that it was his duty to determine whether the refund could be paid from the general appropriation, that is, "whether the refund ordered by the collector was of customs duties *erroneously* and *illegally* collected." Italics are used by counsel for the Auditor in their brief filed herein, page 4.

The argument overlooks the fact that the Tariff Act of 1909 in express words imposes on the Collector of Customs the duty to decide, subject to an appeal as provided by law, whether such duties are erroneously and illegally collected. How can the Auditor claim the right to decide that question—whether duties are erroneously and illegally collected—in the face of the ex-

press words of the Tariff Act? His argument for a general power of review over all administrative officers in all cases which involve the payment of money, and a general power to determine in any case the availability of an appropriation, is unsound *as applied to this case* because at every turn the argument runs into the express words of the Tariff Act which confer jurisdiction on the Collector of Customs to decide this particular question (the dutiability of repairs). To carry out the Collector's decision, which became final upon the failure of the Bureau of Finance to take an appeal to the Court of First Instance, nothing remains to be done but the ministerial act of drawing and countersigning a warrant conformable to the Collectors decision.

The elaborate and learned argument presented in the brief of counsel for the Auditor has no application to this case. From first to last they ignore and disregard the statute which is of vital importance—the Tariff Act of 1909. In their entire brief the Tariff Act of 1909 is mentioned only twice (pages 2 and 3) and then only casually in the statement of the case.

So far as this case is concerned, the Auditor's contention may be narrowed down to a claim of a general power of review of the Collector's decision upon the ultimate question of *fact* on which the right to a refund must depend. That he has no such power of review and that the Collectors finding of fact, that there were no adequate facilities in the Philippine Islands for the repairs in question (R. 19-20) is final and conclusive in the absence of an appeal to the court of first instance, is plain.

It has been repeatedly held that where such discretion is vested in an administrative officer the de-

cisions of that officer with respect to such matters are conclusive and binding on the accounting officers.

United States vs. Jones, 18 How. 92.
United States vs. Johnston, 124 U. S. 236.

For example, in *United States v. Jones*, which involved the question as to the right of the accounting officers of the Treasury to disallow and charge against the officer a payment made to a naval officer by the Secretary of the Navy as an expense allowance. Referring to the Secretary of the Navy, this court said (18 How. p. 95):

> "His acts and decisions, *on subjects submitted to his jurisdiction and control by the constitution and laws*, do not require the approval of any officer of another department to make them valid and conclusive. *The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments.*"

In *United States v. Johnston*, the defendant was sued by the Government to recover the value of cotton which had come to his hands as a special agent of the Treasury Department in 1865. One of his defenses was that he had fully accounted for all his acts as such special agent and that his account had been approved by the Secretary of the Treasury and he had been fully released and discharged. There was a judgment for the defendant and the case was brought to this court on writ of error. It was held, first, that the entire administration of the system devised by Congress for the collection of captured and abandoned

property was committed to the Secretary of the Treasury by the act of 1864. The opinion then continued:

> "It is, however, contended that the words in the third section of the act of 1864, 'all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the Treasury,' negative the supposition that those officers cannot disallow expenses incurred in the collection and sale of captured and abandoned property, which the Secretary may have approved as proper and necessary. By 'proper accounting officers of the Treasury' in that statute, it is contended, is meant the First Auditor and the First Comptroller. It is consequently argued that the settlement upon which the defendant relies constitutes no obstacle to the examintaion of the items of his accounts."
>
> * * * * * * *
>
> "While there is much force in this view of the case, we do not deem it necessary to decide whether the accounts of defendant, in respect to the 483 bales of cotton, were required by the statute of 1864 to be audited by the First Auditor and transmitted to the First Comptroller for his decision thereon. *If the act of 1864 should be held to have required this, it would not follow that those officers could have disregarded the action of the Secretary of the Treasury in allowing the expenses in question. In auditing those accounts, they would have been bound to regard such action of the Secretary as final.* What was said in *United States v. Jones*, 18 How. 92, 96, may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the Secretary of the Navy

> in approving certain disbursements made by an officer of the Navy in conformity with the orders of the Secretary. This court said: 'The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.' See *McKnight v. United States*, 13 C. Cl. 292, 298, 309."

How then can the Auditor here claim a right to revise the judgments and correct the supposed mistakes of the Collector from whose decisions the law expressly provides an appeal to the Court of First Instance?

The determination of the availability of the appropriation, the Auditor contends, is nothing more nor less than the duty and authority to determine whether the customs duties in question had been *erroneously* and *illegally* collected. That duty, however, is committed to the Collector of Customs and not to the Auditor. The court below has done nothing to change or disregard the rule. The court below has lent its aid, as it must, to carry out the determination and decision of the officer charged by law with the duty of determining that question and the right to refund.

Whatever may be the general powers of the Insular Auditor, or the accounting officers of the United States, in this particular case the Auditor does not have jurisdiction to determine whether the duties in question were erroneously or illegally collected, or, as he puts it in the alternative, whether the appropriation is available. So far as Philippine customs duties are concerned, this duty is specifically committed to the Collector of Customs. The history of the government accounting system in the United States has no bearing on the particular and limited question presented in

this case. The accounting officers, whatever may be their historical jurisdiction, are always subject to the will of the legislature which may at any time enlarge or reduce their powers. The Auditor, whose office is established by act of Congress, is always subject to the Congress. The legislative body which creates the office and fixes the powers and duties of the officer may impose limitations and may make exceptions. With respect to the question of the right to a refund of customs duties in the Philippine Islands, the Auditor has no power or discretion. That is a matter which *the legislative body* has seen fit to commit to the Collector of Customs.

In Point VII counsel for the Auditor come directly to the point when they say: "*The jurisdiction of the Collector to settle claims for refund of customs duties is subordinate to that of the Auditor.*"

The argument is that the Auditor has authority, derived from section 24 of the Organic Act, to "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government" and to "audit, in accordance with the laws and administrative regulations, all expenditures of funds;" that this includes, through practice and precedent, the duty to determine the availability of an appropriation for the payment of money; that, therefore, it is the duty of the Insular Auditor to determine the availability for customs refunds of the appropriation provided for that purpose by the Philippine legislature; that the appropriation cannot be said to be available except for refunds of duties *erroneously* and *illegally* collected; and therefore that it is his duty to determine whether the customs duties in question *were* erroneously and illegally collected, that is, *to decide for*

himself every customs refund case on its merits. The argument is directly contrary to the express provisions of the Tariff Act of 1909, which imposes on the Collector of Customs, with an appeal to the Court of First Instance, the duty of deciding whether customs duties are erroneously and illegally collected.

The mere fact that the law provides for appeals from the decisions of the Collector of Customs to the Court of First Instance must remove any doubt as to the *Auditor's* power to review such decisions. Appeals from the decisions of the Collector of Customs in such matters were first provided in 1902 by Act No. 355 of the Philippine Commission authorizing appeals to the Court of Customs Appeals. In 1905, by Act No. 1405, it was provided that the appeals should be to the Court of First Instance. These provisions are now carried in the Administrative Code 1917, sections 1383-1384.

If it had been intended to repeal all these provisions and likewise the express provisions of the Tariff Act of 1909, already quoted, that intention would have been expressed in the Organic Act of 1916. The general language of section 24 of the Organic Act conferring upon the Auditor jurisdiction to "examine, audit and settle all accounts" and to "audit, in accordance with laws and administrative regulations, all expenditures of funds," cannot be read as repealing the express provisions of law with respect to the jurisdiction of the Collector of Customs over customs matters, including refunds of duties erroneously and illegally collected, and the right of appeal to the courts.

The fallacy of the Auditor's contention that the jurisdiction of the Collector of Customs to settle claims for refund of customs duties is subordinate to that of

the Auditor, is further disclosed by a consideration of the effect of a decision by the Collector from which an appeal to the Court of First Instance is taken, and the claimed effect when no appeal is taken. The law provides that either the claimant or the Government may appeal to the Court of First Instance from an adverse decision by the Collector. Administrative Code 1917, sections 1383-1384. Counsel for the Auditor say in their brief, pp. 42-43, that if an appeal is taken to the Court of First Instance, either by the claimant or by the Government, the claim is transferred from the executive department to the judicial department and the Auditor "neither has nor claims any control. The decision of the court in such a case is a judgment not reviewable except by the Supreme Court, and payable out of the general and indefinite appropriation made by act No. 357 of the Philippine Commission." But counsel say that if *no* appeal is taken from the decision of the Collector then the Collector's decision "is reviewable by the auditor as are such decisions of the officers of all the executive branches." That is to say, the jurisdiction of the Auditor *is dependent entirely on whether or not an appeal is taken from the decision of the Collector to the Court of First Instance.* If the decision is in favor of the Government, the claimant may take his appeal and have his hearing in court. If the decision is *in favor of the claimant*, however, and the Government chooses not to appeal, the claimant will be denied his hearing in court. That is to say, the government may choose its tribunal, the court or the Auditor, by perfecting an appeal to the court, or not appealing, and the failure to take an appeal will *confer* jurisdiction on the Auditor. The absurdity of such a construction of the

law is plain. Yet, that is precisely the construction contended for by counsel for the Auditor, at pp. 42 and 43 of their brief.

We cannot regard the decision of the House of Lords in *Rex v. Roberts*, 1925 A. C. 578, as controlling here. There are important differences between that case and this case. In the English case a Board of Works had been granted power by the Metropolis Management Act, 1853, to appoint and remove certain classes of employees, and "may allow to such clerks, treasurers, surveyors, officers and servants, respectively, such salaries and wages as the Board * * * may think fit." By a later act, the Public Health Act, 1875, it was provided that the District Auditor "shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the illegal payment. * * *"

The House of Lords, reversing the Court of Appeals, held that the duty of the District Auditor is not limited to determining whether there was bad faith on the part of the disbursing officer but is broadly to restrain expenditures within proper limits and to inquire if there is any excess over what is reasonable, and that he must use his own judgment as to what is reasonable under the circumstances, and to that extent he has authority to review decisions of the Board of Works with respect to the payment of salaries and wages.

The decision of the House of Lords and the several concurring opinions of the judges must be taken as resting on the provisions of law cited, s. 62 of the Metropolis Management Act, 1853, and s. 247, sub-s. 7 of the Public Health Act, 1875.

The important distinction between that case and

this case is that here we have a series of statutes, beginning with Act No. 355 of Philippine Commission in 1902, conferring upon and recognizing jurisdiction in the Collector of Customs to decide all customs matters, including customs refunds, and providing for appeals *to the courts* from the decisions of the Collector. The fact that the law provides for such appeals necessarily denies the jurisdiction of the Auditor to review such decisions. In *Rex v. Roberts* there was no provision of law for reviewing the decision of the Board of Works except by means of the audit by the District Auditor.

In Points IX and X counsel for the Auditor refer to the use of the words "account" and "audit" in section 24 of the Organic Act and the construction put upon those words by the court below. Undoubtedly, as used in the various acts of Congress cited in the brief of counsel for the Auditor, the word "account" is a general term which covers any item of indebtedness. It does not follow, however, that simply because the Auditor has jurisdiction generally to "examine, audit and settle all accounts" etc. and "to audit, in accordance with law and administrative regulations, all expenditure of funds" etc. such general provisions confer jurisdiction to review the decision of the Collector of Customs with respect to a customs refund, for the review of which specific provision was made. As we have already pointed out, the Auditor's argument is reduced to a contention that because of his *general* jurisdiction over accounts, and his duty to determine the availability of an appropriation, he has authority in this case to determine "whether the customs duties actually had been *erroneously* and *illegally* collected." The quotation, including the italics, is

from the brief of counsel for the Auditor, page 64. We submit this amounts to a contention that the Auditor has absolute power to decide for himself every customs refund case on its merits without regard to the decision of the Collector, and that such a contention is directly contrary to the law which imposes on the Collector of Customs, and, on appeal, the Court of First Instance, the duty and responsibility of deciding such matters.

We have been unable to find anything in the legislative history of the Organic Act, particularly section 24, which lends any support to the Auditor's theory of his powers. We have copied in an appendix hereto references to the reports of the committees and the debates in the Senate and House with respect to section 24.

In view of the express provisions of the Tariff Act of 1909 and the other legislation on this subject, beginning with the acts of the Philippine Commission in 1902, there is no ground for the Auditor's contention. If the system is wrong, from an accounting standpoint, the Auditor's remedy is an appeal to the Congress for legislation.

III.

The Right to Mandamus:

There could hardly be a plainer case for a writ of mandamus to compel a government officer to perform a ministerial act. In the face of every applicable statute, and notwithstanding a showing of meticulous compliance with every requirement of law, the Auditor has persisted in his refusal to countersign the warrant drawn by the Collector of Customs, solely on the ground that he is possessed of some transcendental

power of review over every other government officer in every matter which involves the payment of money. That he has no such power and that his duty to countersign the warrant *in this case* (whatever may be his authority generally) is no more than a ministerial duty, has already been pointed out.

The Supreme Court of the Philippine Islands found that the Auditor's duty was "confined and limited to an investigation of the primary and fundamental facts as to whether a protest was duly filed and a hearing was duly had upon the protest, and that the Collector of Customs had ordered the refund of the money in question, and whether there had been a compliance with all the legal formalities concerning the protest." (R 77.)

It is well settled that a government officer who refuses to perform a ministerial duty imposed by law may be compelled to do so by mandamus.

Commissioner v. Whiteley, 4 Wall. 522.
Lane v. Hoglund, 244 U. S. 174, and cases cited.

It is idle to say that the acts of the accounting officers of the United States, or the Insular Auditor, may not be controlled by mandamus or injunction. They are as much subject to the rule as other government officers. We argue for no larger jurisdiction in the Supreme Court of the Philippine Islands than in the courts of the United States. In such a case as this the courts of the United States would have jurisdiction to grant a writ of mandamus.

Smith v. Jackson, 246 U. S. 388.
McCarl v. Cox, 8 Fed. (2d) 669.
Mare v. Alexander, 2 Fed. (2d) 895, 5 Fed. (2d), 964.
Pence v. McCarl, 54 Wash. Law. Rep. 178.

The rule is the same in the Philippine Islands.

Hoey v. Baldwin—1 Phil. Rep. 551.
Lamb v. Phipps—22 " " 456.
Compania General de Tabacos v. French, 39 Phil. Rep. 34.
Zobel vs. City of Manila—XXXIII O. G. 411.

In *Hoey v. Baldwin*, 1 Phil. Rep. 551, the petitioner alleged that proper certificates showing that he was entitled to receive his salary had been filed with the defendant. It was held: "The only duty which the defendant had to perform in this case was to pay the money to the plaintiff. This was a duty purely ministerial, which the law specially enjoins as a duty resulting from his office."

In *Lamb v. Phipps*, 22 Phil. Rep. 456, the court was called upon to decide whether the Insular Auditor, in examining and settling an account and balancing items of debit and credit, was exercising a judicial discretion not controllable by mandamus. It was held that he was, but the court said:

> "Auditors and comptrollers, as accounting officers, are generally regarded as quasi-judicial officers. They perform *mere ministerial duties* only in cases *where the sum due is conclusively fixed by law* or pursuant to law. Except in such cases, the action of the accounting officers upon claims * * * is not ministerial merely but judicial and discretionary."

In *Zobel v. City of Manila*, XXXIII O. G. 411, recently decided, the Supreme Court of the Philippine Islands said:

"Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first installment of the purchase price; and it is insisted for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the government must be considered to be qualified as regards the contract rights of persons dealing with the city by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor should possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

In the present case the respondent had no other remedy and no choice but to resort to mandamus.

It had no remedy by suit against the Philippine Government because there is no law authorizing such a suit.

Neither did it have any remedy by appeal to the Governor General, as suggested by counsel for the Insular Auditor. The provision in section 25 of the Organic Act, that any person aggrieved by the action or decision of the Insular Auditor in the settlement of an account or claim before the Auditor under section 24, may take an appeal to the Governor General and

to the Secretary of War, obviously refers to accounts and claims before the Insular Auditor which he is required to "examine, audit and settle" and which involve the exercise of a judicial discretion. His duty in this case, however, as hereinbefore shown, is limited to countersigning the warrant drawn by the Insular Collector of Customs (after satisfying himself that the Collector has rendered a decision in a case properly before him under the Tariff Act of 1909, and that the amount of the warrant is in accordance with the terms of that decision). The Auditor's duty in this case is plainly ministerial and does not involve the exercise of judicial power or discretion. The Auditor's refusal to act, therefore, can not be corrected by an appeal to the Governor General.

An appeal to the Governor General would necessarily admit that the Auditor had jurisdiction to review the decision of the Collector of Customs which is denied and which is the only issue in the case. If the Auditor has no such power and has nothing to do but to countersign the warrant drawn by the Collector of Customs (assuming a showing that all the requirements of law have been met), he is clearly subject to mandamus. If he has the power of review for which he contends, the respondent has no case. The only way to test the Auditor's power is by resort to the courts. In any event an appeal to the Governor General would be useless and improper because it would necessarily assume the very power which the Auditor insists he has and which the respondent denies.

In a similar case, *Campania General de Tabacos v. French*, 39 Phil. Rep. 34, the Supreme Court of the Philippine Islands has said:

"The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts.

"In considering the case before us, it is important to bear in mind that the Government is admittedly indebted to the petitioner in the definite and certain sum of ₱322.93. No action, either administrative or judicial, is therefore necessary to fix this liability upon the Government. In so far as legal liability can result from governmental activities, liability exists and upon the demurrer is admitted. Furthermore, said liability is such that it should be absolved by a warrant drawn by the Purchasing Agent and countersigned by the Insular Auditor. The law makes provision for the payment of the money in this way, and it cannot otherwise be gotten out of the Insular Treasury.

"The legal remedy here indicated as proper is the writ of mandamus to compel the Purchasing Agent and the Insular Auditor to issue, countersign, and deliver the proper warrant to the petitioner. (Hoey v. Baldwin, 1 Phil. Rep. 551.)

"The liability of these officers to the coercive process of mandamus arises from the fact that a valid claim exists for the payment of which provision has been made, that these officers are the appointed agents for making the payment, and that under these circumstances the execution and delivery to the creditor of the warrant are merely ministerial functions involving no discretionary action whatever."

Counsel for the Auditor in their brief, page 76, say: "This suit does not rest upon an abuse of power by the Auditor and the case of *Goltra v. Weeks*, decided June 7, 1926, by the Supreme Court of the United States, is not apropos." That is exactly where counsel for the Auditor miss the point. This case *does* rest

upon an abuse of power by the Auditor. We have argued from the beginning that the Auditor has no discretion whatever in such a case and no duty to perform but the ministerial duty of countersigning the warrant to carry into effect the decision of the Collector of Customs, made final by the failure of the Government to appeal as provided by law; that the Auditor has no power of review of that decision; that the respondent has no appeal from the Auditor's attempted exercise of power, because any attempted appeal to the Government would necessarily admit the jurisdiction of the Auditor which is the very thing we deny; and that confronted by the Auditor's usurpation of power and his arbitrary refusal to perform the ministerial duty imposed upon him by law, the respondent's only remedy is by writ of mandamus. The whole case is the abuse of power by the Auditor in his claimed jurisdiction to review the decision of the Collector of Customs. As before stated, if he has such power, the respondent has no case. If he has no such power, the respondent is clearly entitled to the writ as granted by the lower court.

Respectfully submitted,

F. W. Clements,
Lawrence H. Cake,
Counsel for Respondent.

APPENDIX.

The Act of August 29, 1916, 39 Stat. 545.

The bill was introduced in the Senate on December 7, 1915, as S. 381, 64th. Congress 1st. Session, and was referred to the Committee on the Philippines.

It was reported to the Senate on December 17, 1915, accompanied by Senate Report No. 18. The only reference in the report of the Committee to the provision for an auditor was as follows:

> "Heretofore an auditor has been appointed by the Secretary of War with full and independent control of the important work of auditing, checking up, and settling the accounts of public revenues and expenditures in the Philippine Islands. This has proven a very wholesome safeguard, and for that reason a similar provision is incorporated in the pending measure, except that the appointment shall be by the President."

In the debate in the Senate the only reference to the Auditor is found in Senator Hitchcock's statement in explanation of the bill as reported. He said:

> "The bill also provides that the auditor for the Philippine Islands shall be appointed by the President of the United States, and, to some extent, therefore, shall be an independent official and shall audit the accounts of the various departments of the government of the islands, the Philippine government, the provincial governments, and the municipal governments." Congressional Record, Vol. 53, p. 610.

In the House the bill was reported by the Committee on Insular Affairs, House Report 499, on April 6, 1916. In summarizing the features of the provisional Government the report stated:

> "Section 26 provides for the appointment by the President of an auditor, and defines the duties of that official. It also provides for the appointment in the same manner of a deputy auditor."

The conference report, Senate Document 530, in which was copied the bill as finally agreed upon, shows section 24 in the form in which it became law.

In the debate on the conference report in the Senate section 24 was referred to twice. Senator Hitchcock, in explaining the conference report, said:

> "The House conferees also conceded another amendment which the Senate incorporated in the bill, and that was that an auditor for the Islands for the Philippine government, for the provincial governments, and for the municipal governments should be appointed by the President of the United States; that he should have an assistant auditor; and that all the accounts of the Philippine government and its officials, the accounts of the municipal governments and of the provincial governments should pass through the hands of this auditor. This is for the purpose of insuring in the future what has been true of the past, a protection against the possibility of graft or the misappropriation of funds in the Islands." Congressional Record, Vol. 53, p. 12592.

Later in the debate he referred again to the auditor:

> "The Senate conferees found themselves under the necessity of accepting the House amendment, which was practically a substitute for the Senate bill, embracing 33 sections, and we were able, after several conferences with the House conferees, to induce them to accept four or five of the important amendments which I have already recited, and which go to vital matters, affecting the perpetuation of good government in the Islands. One of

those amendments related to the vice governor, another to the auditor, another to the electorate. Those were vital amendments which we were able to induce the House conferees to accept." Congressional Record, Vol. 53, p. 12594.

In the House in the debate on the conference report Mr. Jones referred to section 24 as follows:

"The Senate bill also provided for the appointment by the President of an auditor and a deputy auditor. The House bill contained no such provision. The conferees on the part of the Senate insisted that it was important that there should be an auditor and a deputy auditor to supervise the accounts of the Islands, and the House conferees yielded the point." Congressional Record, Vol. 53, p. 12836.

SUPREME COURT OF THE UNITED STATES.

No. 316.—October Term, 1926.

Ben F. Wright, Auditor for the Philippine Islands, Petitioner, *vs.* Ynchausti and Company. | On Writ of Certiorari to the Supreme Court of the Philippine Islands.

[December 13, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This case was begun by a petition filed by Ynchausti and Company January 19, 1925, in the Supreme Court of the Philippine Islands, under sec. 2947 of the Compiled Acts of the Philippine Commission 1907, for an original writ of mandamus directed to Ben F. Wright, Insular Auditor, to require him to countersign a warrant for 159,960 pesos drawn by the Insular Collector of Customs in favor of Ynchausti and Company. The Insular Auditor filed an answer, to which the petitioner demurred, on the ground that the facts stated therein were not sufficient to constitute a defense. The Supreme Court of the Philippine Islands sustained the demurrer and ordered that the writ issue as prayed. This Court granted a certiorari April 26, 1926. 271 U. S. 652.

Ynchausti and Company were the agents and operators of the steamship Venus, a vessel engaged in the coastwise trade in the Philippine Islands. They sent her to Hong Kong, a Crown colony of Great Britain, there to receive certain heavy repairs and construction work. When the vessel returned to the Philippines, the Insular Collector of Customs who is Collector at Manila and who has subordinate collectors at other ports, assessed a customs duty of 159,960 pesos on account of the repairs. Ynchausti and Company paid the duty but filed a protest with the Collector, on the ground that the repairs were free from duty under the law. The Collector deposited the money in the Insular Treasury. Upon a

hearing of the protest and an examination of evidence, the Collector reversed his ruling, rendered a decision sustaining the protest and ordered a refund of the money paid under a permanent appropriation for such purposes. A copy of the Collector's decision was sent to the Secretary of Finance and the Insular Auditor. The Secretary of Finance did not certify a desire to appeal from the Insular Collector's decision to the Court of First Instance within fifteen days thereafter, as authorized by law, although the Insular Auditor urged it. After the time for an appeal had expired, a warrant was drawn by the Insular Collector in favor of Ynchausti and Company for the amount of the duty paid. Upon presentation of the warrant to the Insular Auditor for his countersignature, required by the Administrative Code of the Islands to be attached to every warrant, he withheld it.

By sections 614, 616, 621 of the Insular Administrative Code of 1917 revenue funds are not to be withdrawn from the Insular Treasury except upon warrant. Warrants are to be drawn upon the Insular Treasury by the Chief of the Bureau or office having control of the appropriation or fund against which such warrants are chargeable and are to be made payable to the creditor to whom the money is due. No Insular warrant is to be paid by the Treasurer until countersigned by the Auditor. By section 3920 of the Compiled Laws of the Philippines of 1907 a permanent appropriation is provided for refund of duties paid into the Treasury in excess of the final liquidation and the amount legally due.

The history of the legislation in respect to classification for duties on repairs of Philippine vessels made in a foreign country is as follows:

The Philippine Tariff Act of Congress of August 5, 1909, 36 Stat. 130, c. 8, sec. 8, provided:

"That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States, or any of its possessions except as otherwise provided in this Act, shall be as follows: . . .

"Par. 200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem.

"Provided, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

Paragraph 348 is part of section 11 of the same act, and declares that certain imports shall be free of duty upon the importation thereof into the Philippine Islands. One is described as follows:

"Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands."

This Tariff Act was amended by the Philippine Legislature under the authority of the Act of Congress of August 29, 1916, 39 Stat. 545, c. 416, usually called the Jones Act, by section 10 of which it is provided:

"That while this Act provides that the Philippine government shall have the authority to enact a tariff law the trade relations between the islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States: *Provided*, That tariff acts or acts amendatory to the tariff of the Philippine Islands shall not become law until they shall receive the approval of the President of the United States."

Acting under this authority, the Philippine Legislature passed an amendment to the Tariff Act, entitled No. 2872, which was approved by the President of the United States on November 24, 1919. That Act amended section 200, already quoted, by continuing the duty on repairs at 50 per centum until December 31, 1924, and then reducing the rate to 25 per cent. thereafter, and changed the proviso as follows:

"*Provided*, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

The question here presented is whether the Philippine Auditor may consider and reverse the ruling of the Insular Collector in respect to the refund of the duties paid on these repairs, or whether the ruling of the Insular Collector under the circumstances is final and the necessary countersigning of the warrant drawn by the

Insular Collector is merely a ministerial duty subjecting the Auditor to mandamus.

The Act of Congress of August 29, 1916, to provide a more autonomous government for the Philippines, known as the Jones Act (39 Stat. 545, c. 416, sec. 24), describes the present powers and duties of the Insular Auditor in part as follows:

"That there shall be appointed by the President an auditor, who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches.

"He shall keep the general accounts of the government and preserve the vouchers pertaining thereto.

"It shall be the duty of the auditor to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive or extravagant. . . .

"The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive. With the approval of the Governor General, he shall from time to time make and promulgate general or special rules and regulations not inconsistent with law covering the method of accounting for public funds and property, and funds and property held in trust by the government or any of its branches: . . .

"The decisions of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed. The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office. . . ."

In the administration of his duty, he is authorized to summon witnesses, administer oaths and to take evidence and enforce the attendance of witnesses.

Section 25 provides:

"That any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authorities relied upon for reversing such decision.

"If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal and transmit it to the auditor and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive."

The argument is that as the subject matter here is a claim against the Insular Treasury, it is necessarily exclusively within the broad powers of the Auditor to pass on it, and that his duty to countersign the warrant for it includes this discretion which can only be reviewed by the Governor General and the Secretary of War. There is no doubt that from the beginning of the civil government in the Philippines, established by the President as Commander-in-Chief, in 1901, it was his intention to give to the Secretary of War the means of supervising the disbursements of the funds in the Philippine Treasury and the allowance of claims upon them through the Insular Auditor who was to be appointed by the Secretary of War. Presidential Order February 23, 1901, Act No. 90, Public Laws Enacted by the Philippine Commission, vol. 1, p. 160. There was substituted by the Philippine Commission for Act No. 90, the Accounting Act, No. 1402, in 1905, *op. cit.*, vol. 5, p. 58, and the new Accounting Act, No. 1792, in 1907, *op. cit.*, vol. 6, p. 475. Then followed the Administrative Act of 1916, by the Philippine Legislature, which created a Board of Audits with the Auditor at its head, and this was repeated in the Administrative Code of 1917, c. 26, enacted after the passage of the Jones Act. The scope of duties of the Auditor as conferred in Act No. 90 is substantially the same as in the acts which have followed it. It was said in all these acts, including the Jones Act, that the Insular Auditor should have the same authority as the several auditors of the United States and the Comptroller of the Treasury.

Parallel with this legislation, however, was the Customs Administrative Act of 1902, No. 355, Public Laws Enacted by the

Philippine Commission, vol. 1, p. 788, which organized the Bureau of Customs on February 6, 1902, very shortly before the passage by Congress of an act temporarily to provide revenue for the Philippine Islands, March 8, 1902 (32 Stat. 54, c. 140) confirming the Tariff Act passed by the Commission in September, 1901, No. 230, Public Laws Enacted by the Philippine Commission, vol. 1, p. 581. By that Act and by all subsequent amending acts on the subject, collectors of customs were given the duty of liquidating the duties, of determining abatements for manifest clerical error, and for loss or damage of goods, and of promptly granting refunds as allowances or abatements, and those claims thus allowed by the collectors were to be certified to the Auditor of the Islands, with their recommendations and with all necessary papers and documents. This was provided evidently to permit prompt correction of clerical and other obvious errors by the collector. The Auditor was directed to audit the same and draw the warrant for the refund so forwarded in settlement therefor if found correct. The foregoing is embodied in existing law in the Administrative Act of 1917, and it may be that in such a case, by reason of the language used, the Insular Auditor is given discretion to withhold his approval of a refund thus granted by the Collector. We do not find it necessary to decide that question and only mention it in order to make clear the question before us and what we are deciding.

What we are here dealing with is not clerical or other obvious errors in collections but controversies over the classification of articles for duty under the Tariff Act and the determination of the duties to be assessed upon such articles by the Collector, accompanied and contested by a filed protest of the importer. In such a case a different system has been provided from the beginning in 1902. By sections 286, 287, 288 and 289 of the Customs Administrative Act of 1902, provision was made for the classification of the imports and the fixing of duties by the Collector and their collection, a protest by a tax payer who objected, an appeal on that protest to the Insular Collector, an appeal from his decision by the defeated tax payer to a court created by the Act, called a Court of Customs Appeals which conclusively decided the question. This law also provided that if the decision of the Insular Collector was adverse to the government, the Secretary of Finance and Justice, the head of the Department, might within a certain time initiate an appeal to the Court of Customs Appeals.

Thereafter the personnel of the Court of Customs Appeals was changed in Act No. 864, September 2, 1903, Public Laws Enacted by the Philippine Commission, vol. 3, p. 3, and an appeal given upon the disagreement between the Judges of the Court of Customs Appeals to the Supreme Court.

By Act No. 1405, adopted by the Commission October 13, 1905, Public Laws Vol. 5, p. 75, the Court of Customs Appeals was abolished and its duties were transferred to the Court of First Instance, with an appeal to the Supreme Court, and these changes were all embodied in the compilation of the statutes made in 1907 and have been continued since in the Administrative Acts of 1916 and 1917. No change in the administration of the Bureau of Customs or the Bureau of Audits was made by the Philippine Tariff Act of Congress of August 5, 1909, (36 Stat. 130, c. 8) which supplanted the Tariff Act of the Philippine Commission of 1902.

The present procedure fixed by Philippine law for raising the question of the legality of classification for duty on importations and of the collection of such duties is to be found in the Administrative Code of the Islands of 1917, already cited, made necessary by the passage of the Jones Act.

The relevant sections of the Code follow:

"Section 1383. The party aggrieved by the decision of the Insular Collector in any matter brought before him upon protest or by his action or decision in any case of seizure may procure the cause to be removed for review into the Court of First Instance sitting in the city of Manila, in the manner and within the period hereinafter prescribed.

"Unless the proper party in interest shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him.

"Section 1384. The removal of a cause into court may be had at the instance of the protesting party, or, in case of seizure, at the instance of the owner or agent of the seized property. If the decision of the Insular Collector is adverse to the Government the cause may also be removed in the manner hereinafter specified, by order of the Department Head.

"Section 1386. Upon making any decision which may be removed upon the order of the Department Head, the Insular Collector shall immediately transmit a copy of such decision to him and also to the Insular Auditor; and if within fifteen days thereafter the Department Head shall certify that in his opinion the decision ought to be revised by the Court of First Instance in the city

of Manila, it shall be the duty of the Insular Collector, upon notification thereof, to transmit the original record to said court in the same manner as upon removal by a party other than the Government."

This history shows that since the beginning of civil government in the Philippines, the policy of the Island Government has been to take out of the jurisdiction of the Auditor contested claims for refund of duties based on protest, and involving a re-examination of the action of the local Collectors of Customs by the Insular Collector in assessing such duties. The decisions of the Insular Collector with respect to refunds of this class, were administratively final, but appeals from his conclusions, if duly taken became the subject of judicial examination at first by the Court of Customs Appeals and afterwards by the Court of First Instance of the proper jurisdiction and by the Supreme Court.

It is thus quite clear that the provision of the Jones Act and of acts which preceded it, for review of the decisions of administrative officers by the Insular Auditor from which appeals could be taken to the Governor General of the Islands, and thence to the Secretary of War, was not intended to include decisions upon protested classification of duties under the Tariff Act.

The unchanged policy as to such decisions is that appeal from the Insular Collector's action should be left to the taxpayer, on the one hand, and to the head of Finance Department, on the other, and if taken should be considered by the courts; and that failing such appeal, the action of the Insular Collector should be final. It would be incongruous to provide for appeal to the courts at the instance of either the importer or the head of the department, and in the absence of such appeal by either, to have a review by the Auditor. It would delay decision of the legality of the classification for a year. It would create two tribunals of appeals in respect to classification which might cause embarrassing and confusing conflict.

It has not been directly argued but there has been an intimation in the argument for the petitioner that greater weight is to be attached to the Congressional acts, including the Jones Act, in defining the duties of the Auditor than to the provisions of the Customs Administrative Act of 1902, and of the Administrative Acts of 1916 and 1917, fixing the duties of the Insular Collector in classification of duties and appeals to the courts, which were acts only

of the Philippine Commission or the Philippine Legislature without specific Congressional approval. If there were a conflict between the two, of course, the Congressional legislation must control. But conflict is not to be presumed because, first, under the Letter of the President in establishing the Philippine Commissions of date April 7, 1900, Public Acts Enacted by the Philippine Commission, vol. 1, p. lxiii; second, under the Act of Congress of July 1, 1902, 32 Stat. 691, c. 1369, confirming the prior legislative action of the Philippine Commission and vesting future legislative power in the Commission and in a subsequent legislature therein provided for, and third, under the Jones Act, 39 Stat. 545, c. 416, changing somewhat the form of the Philippine government, all general legislative power was vested in the Island legislature, with some exceptions, of which none included the administrative provisions for collecting the customs revenue. Of course all such legislation was subject to annulment by Congress, but although the legislative provisions for action by the Insular Collector of Customs and the courts in respect to classification of imports and collection of duties were established in 1902 and continue until today, they have never been disturbed and have evidently never been thought by Congress to be in conflict with the powers of the Auditor.

In view of this legislative history, it is not difficult to reach a conclusion and to define what the function of the Auditor of the Islands in such a case as this is. To take money out of the Treasury on appropriation, a warrant has to be drawn by the head of the bureau having the payment of the claim in charge and the warrant must be countersigned by the Insular Auditor before it is paid; but where the Insular Auditor is not vested with administrative discretion to pass upon the merits of the claim for which the warrant is drawn, his only function is to determine whether the warrant is drawn by the proper officer upon the decision of the proper tribunal, and is applicable to an existing appropriation, and having been satisfied as to these preliminaries, his duty is merely ministerial. In this case having ascertained that the Insular Collector has rendered an opinion that was final by reason of a failure of either party to appeal to the court therefrom, it is his duty to countersign the warrant and such a duty may be controlled by mandamus. *Kendall* v. *United States*, 12 Peters 524;

Work v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U. S. 200; *Work* v. *United States ex rel. Mosier*, 261 U. S. 352.

We may add that such a conclusion is quite in keeping with the functions of the Auditors of the Treasury and the Comptroller of the Treasury of the United States, a comparison which is constantly used in the Philippine statutes. Neither the Auditors nor the Comptroller of the Treasury of the United States is vested with authority to decide questions of classification of duties under tariff acts. Those are considered and disposed of, first by the Collectors of Customs, then by appeal after written notice to a Board of General Appraisers and then by a review by the Court of Customs Appeals. Act of June 10, 1890, 26 Stat. 131, 136, c. 407, sec. 12; Act of May 27, 1908, 35 Stat. 403, 406, c. 205, sec. 3; Act of August 5, 1909, 36 Stat. 11, 98, c. 6, sec. 28; Act of September 21, 1922, 42 Stat. 858, 970, c. 356, Title IV, sec. 515. Under certain limitations a further review may be had in this Court. Act of August 22, 1914, 38 Stat. 703, c. 267.

The judgment of the Philippine Supreme Court is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court. U. S.